SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 84

CITY BANK FARMERS TRUST COMPANY, EXECUTOR UNDER THE WILL OF THOMAS B. CLARKE, DECEASED, APPELLANT,

vs.

WILLIAM A. SCHNADER, ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA, AND LEON D. METZGER, SECRETARY OF REVENUE OF THE COMMONWEALTH OF PENNSYLVANIA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, SEPTEMBER TERM, 1932

No. 7395

CITY BANK FARMERS TRUST COMPANY, Executor Under the Will of Thomas B. Clarke, Deceased,

vs.

Honorable WILLIAM A. SCHNADER, Attorney General of the Commonwealth of Pennsylvania, and Honorable Leon D. Metzger, Secretary of Revenue of the Commonwealth of Pennsylvania

L. M. Swope, Drinker, Biddle & Reath, H. S. Drinker, Jr., H. Gordon McCouch.
W. A. Schnader.

DOCKET ENTRIES

Nov.	23, 1932.	Bill of Complaint filed.
"	23, "	Subpœna and Duplicate-Original Subpœna exit—returnable December 13, 1932.
"	23, "	Appearance of L. M. Swope, Esq., H. S. Drinker Jr. Esq., and H. Gordon McCouch, Esq., for plaintiff filed.
"	23, "	Motion for interlocutory injunction filed.
"	23, "	Injunction affidavit by C. C. Jordon filed.
"	23, "	Injunction affidavit by F. Kimball filed.
"	25, "	Restraining order filed.
"	25, "	Bond sur restraining order in $1,000 with American Surety Company of New York surety, and Decree approving same filed.
"	25, "	Printed copy of bill of complaint filed.
"	30, "	Proof of service of notice required by Sec. 266 of the Judicial Code filed.
Dec.	2, 1932.	Duplicate-original supœna returned: "on November 29, served" and filed.
"	6, "	Subpœna returned: "on November 23, served Wm. A. Schnader; not requested to serve L. D. Metzger", and filed.

[fol. 2]

Dec. 19, 1932. Answer filed.
" 19, " Argued sur motion for interlocutory injunction.
Jan. 5, 1933. Printed copy of stipulation filed.
Mar. 24, 1933. Opinion (Thompson, C. J., Dickinson and Kirkpatrick, D. JJ.) that Bill of Complaint be dismissed for want of equity filed.
Apr. 11, 1933. Final Decree dismissing Bill of Complaint filed.
" 11, " Assignments of Error and prayer for reversal filed.
" 11, " Petition for appeal and Decree allowing appeal filed.
" 11, " Statement as to jurisdiction of appeal filed.
" 11, " Bond for costs sur appeal in $250 with American Surety Company of New York surety, and Decree approving same filed.
" 11, " Citation to Supreme Court of United States exit.
" 28, " Citation returned: "service accepted" and filed.
May 4, 1933. Proof of service of copy of appeal papers filed.
" 8, " Præcipe for transcript of record sur appeal filed.
" 8, " Proof of service of præcipe for transcript of record sur appeal filed.

[fol. 3] IN UNITED STATES DISTRICT COURT

[Title omitted]

BILL OF COMPLAINT—Filed Nov. 23, 1932

To the Honorable the Judges of the said Court:

City Bank Farmers Trust Company, Executor under the Will of Thomas B. Clarke, Deceased, brings this bill of complaint against the Honorable William A. Schnader, Attorney General of the Commonwealth of Pennsylvania, and the [fol. 4] Honorable Leon D. Metzger, Secretary of Revenue of the Commonwealth of Pennsylvania; and thereupon complains and says:

1. Plaintiff was at all times hereinafter mentioned and still is a banking corporation with trust powers, duly organized and existing under the law of the State of New York.

2. Defendant, William A. Schnader, is the duly appointed and qualified Attorney General of the State of Pennsylvania; and is a citizen of the United States, and a resident of the City of Philadelphia, County of Philadelphia, State of Pennsylvania and Eastern District of said State.

3. Defendant, Leon D. Metzger, is the duly appointed and qualified Secretary of Revenue of the Commonwealth of Pennsylvania and as such is the administrative head of the Department of Revenue of said Commonwealth; and is a citizen of the United States, and a resident of Harrisburg, Dauphin County, State of Pennsylvania, and Middle District of said State.

4. The matter in controversy in this case, exclusive of interest, exceeds the sum or value of Three Thousand Dollars ($3,000).

5. Thomas B. Clarke, a citizen of the United States and a resident of, and legally domiciled in, the Borough of Manhattan, City, County and State of New York, died on the 18th day of January, 1931, leaving a will and codicils thereto which were duly admitted to probate as the last Will and Testament of said Thomas B. Clarke by the Surrogate's Court of New York County to which court jurisdiction in that behalf appertained, on the 27th day of January, 1931, and letters testamentary thereunder duly issued to the said City Bank Farmers Trust Company, and said letters still remain in full force and effect. Copy of said will and codicils are hereto annexed and made a part hereof, marked "Exhibit A".

[fol. 5] 6. At the time of said Thomas B. Clarke's death, there was on exhibition in the Pennsylvania Museum and School of Industrial Art at Philadelphia, a collection of seventy-nine (79) early American portraits which he had assembled over a period of twenty or thirty years and had loaned to the Museum on the occasion of the formal opening of the new Museum Building on the Parkway, in March, 1928. Said Thomas B. Clarke had no other property

located in Pennsylvania or taxable therein at the time of his death.

7. Said collection of paintings had an estimated market value on the date of death of $714,750.00.

8. The plaintiff is informed, believes and therefore avers that said collection of early American portraits had been loaned to the Museum for the purpose of free exhibition to the public, at the request of Dr. Fiske Kimball, Director of the Museum, who was an intimate friend of the deceased, Thomas B. Clarke; that no consideration was paid or intended to be paid to said Thomas B. Clarke for such loan, that there was no written agreement respecting the loan, which was entirely an oral transaction; but that it was understood by and between Thomas B. Clarke and said Dr. Fiske Kimball that the pictures should be returned to the owner at any time upon his request.

9. The plaintiff is informed, believes and therefore avers that on several occasions subsequent to the date of the original loan, said Thomas B. Clarke suggested the return of said paintings but under pressure from Dr. Fiske Kimball to extend his loan because of the great appreciation shown by the public thereof, said Clarke orally consented from time to time, to leave the paintings temporarily at the Museum, and thus, said portraits were there on display at the time of Thomas B. Clarke's death.

10. The plaintiff is informed, believes and therefore avers that said, The Pennsylvania Museum and School of [fol. 6] Industrial Art, is a non-profit corporation partially supported by the City of Philadelphia and the Commonwealth of Pennsylvania, and has secured a substantial portion of works of art therein displayed to the public by voluntary loans from non-resident philanthropists; and such accommodation loans of works of art, none of which were intended or regarded as permanent loans to said The Pennsylvania Museum and School of Industrial Art, have been continued for an average period considerably longer than the period from the date of the original loan in question to the death of the said Thomas B. Clarke.

11. Under the will of said Thomas B. Clarke, deceased, as amended by the second codicil thereto, the executor was directed to sell all of the decedent's property, including

the said collection of portraits, and after payment of certain legacies and the setting up of certain trusts the residuary estate was bequeathed to said City Bank Farmers Trust Company, in trust, to collect and pay the income from one-half thereof to the testator's son for life and upon the said son's death, to pay the principal of said one-half part to the son's issue, or in default of issue, to certain charities named; and as to the other half, to divide the same into four equal parts and to collect and pay the income of three of said parts, respectively, to three relatives of the testator, and upon the death of each such life beneficiary to pay the principal of his or her share to his or her issue, and to pay and deliver the principal of the fourth such part to certain nieces of the testator.

12. Section 1 of the Act of June 20, 1919, P. L. 521, 72 P. S. § 2301, as last amended by the Act of June 22, 1931, P. L. 690, of the State of Pennsylvania, provides in part as follows:

"Section 1. Be it enacted, &c., That a tax shall be, and is hereby, imposed upon the transfer of any property, real or personal, or of any interest therein or income therefrom [fol. 7] in trust or otherwise, to persons or corporations in the following cases:

(a) When the transfer is by will or by the intestate laws of this Commonwealth from any person dying seized or possessed of the property while a resident of the Commonwealth, whether the property be situated within this Commonwealth or elsewhere.

(b) When the transfer is by will or intestate laws of real property within this Commonwealth, or of goods, wares, or merchandise within this Commonwealth, or of shares of stock of corporations of this Commonwealth or of national banking associations located in this Commonwealth, and the decedent was a nonresident of the Commonwealth at the time of his death."

Said tax is imposed by said Act at the rate of 2% of value on transfers to lineal descendants and certain other close relatives and at the rate of 10% on transfers to collaterals and all others; except that any buildings, grounds, books, manuscripts, curios, pictures, statuary or other works of

art, specimens of natural history or other scientific collections passing by will to any municipality, corporation, or unincorporated body for the sole use of the public by way of free exhibition within the State of Pennsylvania, are not subject to any inheritance tax by express provision of the Act of July 9, 1919, P. L. 794, as amended by the Act of June 12, 1931, P. L. 553.

13. Under the provisions of the Act of April 9, 1929, P. L. 343, Art. XIV, Sec. 1401; 72 P. S. § 1401, said inheritance tax is apparently a lien on the property transferred subject to such tax, from the date of settlement until the tax is paid or satisfied, such lien being limited to the property chargeable therewith.

14. The procedure for the collection of transfer inheritance taxes on transfers from estates of non-resident decedents as provided by Section 1202 of said Act of April [fol. 8] 9, A. D. 1929, P. L. 343, 72 P. S. § 1202, is that the Department of Revenue whenever the occasion may require, shall appoint an appraiser to appraise the value of such property if subject to tax; such appraiser shall forthwith give notice by mail to interested parties of the time and place when and where he will appraise such property, at which time he shall truly appraise the property for taxation and make report thereof to the Department of Revenue in writing; and the Department of Revenue shall immediately give notice to all interested parties, and "any person not satisfied with the appraisement made by an appraiser appointed by the Department of Revenue may appeal within 30 days to the Court of Common Pleas of Dauphin County on paying or giving security to pay all costs, together with whatever tax shall be fixed by the Court. Upon such appeal, the Court may determine all questions of valuation, and the liability of the appraised estate for such tax subject to the right of appeal to the Supreme or Superior Court."

And it is provided in Section 1406 of the Act that the Department of Justice may bring suit at law or in equity in any court in the Commonwealth to recover such taxes "and a remedy by means of such suit is hereby provided, whether it be now authorized by law or not".

And it is further provided in Section 203 (h) of said Act that the Department of Revenue shall have the power and

its duty shall be to collect the transfer inheritance tax payable on estates of non-resident decedents.

Section 503 of said Act provides the only relief after payment of the tax by allowing a petition for refund to the Board of Finance and Revenue, an administrative Board within the Department of Revenue; but provides that the action of the Board on such petition shall be final and thereby denies an appeal from its decision to the courts. The Act makes no provision for interest on refunds granted and plaintiff is advised, believes and therefore avers that in practice no interest is allowed thereon.

[fol. 9] 15. On March 25, 1931, plaintiff, through its attorneys, disclosed the facts involved in this case to Mr. Linn L. Reist, the proper official in the Department of Revenue in charge of the appraisal, assessment and collection of inheritance taxes on non-resident estates, and, by letters dated March 26th and April 27, 1931, to the defendant, William A. Schnader.

16. On April 7, 1931, plaintiff's attorneys in Philadelphia, received the following notice:

"Commonwealth of Pennsylvania, Department of Revenue

Harrisburg, April 6th, 1931.

"This is full and sufficient notice that an official appraisement of the Pennsylvania assets belonging to the Estate of Thomas B. Clarke, late of New York City, will be held in
P. M.
the office of the Secretary of Revenue on Monday morning,
2-30
April 20th, 1931, at Eleven o'clock.
Harry T. Shadduck, Appraiser. Harry T. Shadduck."

17. Under date of April 13, 1931, defendant, William A. Schnader, addressed a letter to plaintiff's counsel in Philadelphia, insisting upon making a formal record by filing a return with the Department of Revenue and appearing before the appraiser at the hearing set and described in the preceding paragraph.

18. Pursuant to the said instructions of the defendant, William A. Schnader, plaintiff filed under protest with the

Department of Revenue at Harrisburg, Pennsylvania, on April 20, 1931, a so-called "Application for Appraisement and Waiver of Transfer Inheritance Tax Provisions". The [fol. 10] material parts of said return are as follows:

"5. That the total gross value of the real estate and the goods, wares and merchandise within the Commonwealth of Pennsylvania, and of the shares of stock of corporations of the Commonwealth of Pennsylvania and National Banking Associations located therein, of which the decedent died possessed, amounted to the sum of $—o—, a complete inventory whereof is attached as Schedule D. See, however, items included in Schedule D under protest."

"Schedule D

"79 Portraits by early American artists loaned to Pennsylvania Museum of Art at Philadelphia, listed and described in appraisal affidavit of Clarence J. Dearden hereto annexed $714,750.00.

"Some time prior to his death the decedent loaned the above described paintings to the Pennsylvania Museum of Art at Philadelphia for purposes of public exhibition. These paintings have been and still are exhibited in connection with a number of other portraits by early American artists which are the property of The Art House, Inc., a New York corporation controlled by the decedent. The loan of the decedent's paintings was made at the request of Mr. Fiske Kimball, Director of the Pennsylvania Museum, and the arrangements were informal. No written contract or other agreement was made and no definite time was fixed as the duration of the loan. No consideration was paid to Mr. Clarke for the loan. It was understood that Mr. Clarke could recall the paintings at any time. It happened that the paintings were still physically located in Philadelphia at the time of decedent's death, but it is respectfully submitted that they were only temporarily in the State of Pennsylvania and had no actual situs therein for purpose of taxation.

"The said 79 paintings were the only property of the [fol. 11] decedent within the Commonwealth of Pennsylvania at the time of his death."

19. On April 20, 1931, the scheduled hearing was held in Harrisburg by Harry T. Shadduck, an appraiser in the

Department of Revenue, since resigned, at which hearing plaintiff was represented by counsel and denied the right of the Commonwealth of Pennsylvaina to appraise, assess and collect a tax upon the aforesaid collection of paintings temporarily in the Commonwealth of Pennsylvania at the time of decedent's death. Said appraiser referred the question of taxability of the aforesaid paintings to the Department of Justice, of which defendant, William A. Schnader, is head, for a determination. Pending such decision, he made no attempt to appraise the taxable value of the estate but postponed said hearing from day to day to a future undetermined day to be held after the Department of Justice had passed upon the legality of the proposed tax, and after notice to the parties.

20. Throughout the spring of 1932, in response to repeated requests of plaintiff for an immediate determination of tax liability, the defendant, William A. Schnader, orally advised plaintiff through its counsel that the Department of Justice was withholding determination of the legal question of liability pending an attempt on its part to work out a reciprocity agreement with the State of New York concerning the taxation of movable tangible property under circumstances such as those involved in this case.

21. Meantime, plaintiff as Executor of the Estate of Thomas B. Clarke, deceased, had taken up the question of tax liability with the proper officials of New York State and was advised in a letter dated July 11, 1931, from the New York State Tax Commission that the said collection of 79 paintings had its situs in New York and was subject to the New York estate tax and that an extension of time to [fol. 12] pay said tax pending the determination of the legal question involved in Pennsylvania had been refused. Pursuant to the demand made in said letter and in order to avoid the severe penalties imposed by the New York statute for non-payment within a year and a half of decedent's death, plaintiff paid to the State of New York on July 15, 1932, an estate tax amounting to $69,500 on the basis of a return which included therein the aforesaid collection of 79 paintings at the said value thereof in the amount of $714,500.00.

22. Immediately after such payment to New York, plaintiff again through its counsel took up the question with

defendant, William A. Schnader, who orally advised plaintiff that its claim of non-taxability in Pennsylvania would be denied.

23. The plaintiff is advised by its counsel, believes and therefore avers, that if the said section 1 of the Act of June 20, 1919, P. L. 521, as amended (paragraph 12, supra) be construed to impose an inheritance tax upon the transfer by death of the non-resident owner thereof, of the said 79 paintings, merely because they were temporarily "within this Commonwealth" at the time of decedent's death, it is unconstitutional in that it deprives the plaintiff of its property without due process of law and denies to the plaintiff the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

24. The plaintiff is advised by its counsel, believes and therefore avers, that if said statute be construed as not applying to property temporarily within the Commonwealth at death, then the threatened appraisal, assessment and collection by the defendants of said inheritance tax unconstitutionally deprives the plaintiff of its property without due process of law and denies to the plaintiff the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

[fol. 13] 25. The plaintiff avers that the threat of the said appraisement, assessment and collection of the aforesaid inheritance tax by the defendants and the unlawful failure and refusal of the defendant, Leon D. Metzger, to issue a waiver of taxes in this estate for over a year and a half, has caused and is causing immediate irreparable injury to plaintiff in that it is seriously interfering with the proper administration of the Thomas B. Clarke Estate in the Surrogate's Court of New York and is preventing distribution of the estate to the legatees thereof who are entitled thereto, and is forcing the plaintiff as executor to maintain large cash reserves at a low rate of interest to cover possible taxes in Pennsylvania and the costs of litigation there, including the cost of bonds and of attorneys' fees; and in that the threatened tax constitutes a possible lien and, therefore, cloud on the title of plaintiff to the aforesaid 79 paintings and, consequently, interferes with the sale thereof as provided for in the will of testator.

26. The plaintiff is advised by its counsel, believes and therefore avers, that it has no adequate remedy at law in that the statutes of Pennsylvania make no provision for bringing suit in the courts of that state for the refund of inheritance taxes overpaid but only provide, as aforesaid, for an application for a refund to an administrative board from whose decision there is no appeal and even if favorably decided by such board, no interest is allowed on any refund granted; in that the only remedy provided by the statutes of Pennsylvania prior to payment is a statutory form of appeal to the Dauphin County Court where a bond must be posted covering the full amount of tax and costs of suit and there is no provision for the restitution of the cost of such bond, which, in this case, would amount to a large sum of money, even if plaintiff should succeed before such Court; and in that the plaintiff has no adequate remedy at law in the federal courts, to which it is entitled because of the diversity of citizenship between the parties to this suit.

[fol. 14] Wherefore the plaintiff is in need of equitable relief and prays:

A. That an injunction issue temporary until hearing and perpetual thereafter enjoining and restraining the defendant, Leon D. Metzger, and his and each of his deputies, officers, agents, servants and employees and any and every person in the Department of Revenue of the Commonwealth of Pennsylvania, acting under and by virtue of his authority, from in any way completing or attempting to complete the appraisement, assessment and collection of inheritance taxes from the plaintiff in the estate of Thomas B. Clarke now being undertaken and from refusing to issue a tax waiver to the plaintiff covering the property set forth above.

B. That an injunction issue temporary until hearing and perpetual thereafter enjoining and restraining the defendant, William A. Schnader, and his and each of his deputies, officers, agents, servants and employees and any and every person in the Department of Justice of the Commonwealth of Pennsylvania, acting under and by virtue of his authority, from enforcing the provisions of the said section 1 of the Pennsylvania Act of June 20, 1919, P. L. 521, as

amended, and from prosecuting or bringing any action at law or in equity against the plaintiff for the collection of inheritance taxes upon the transfer by death of said Thomas B. Clarke, deceased, of the aforesaid collection of 79 paintings.

C. That a temporary restraining order be issued against defendant, Leon D. Metzger, and each of his officers, agents, servants and employees in the Department of Revenue from proceeding with the appraiser's hearing aforesaid and from making a tax appraisement and assessment in this estate.

D. That such other and further relief be granted as to your Honorable Court shall seem meet.

E. That a duplicate writ may issue out of and under the seal of this Honorable Court directed to the United States [fol. 15] Marshall of the Middle District of the State of Pennsylvania for service upon the defendant, Leon D. Metzger, said duplicate writ therein and thereby commanding the said defendant on a certain day therein to be named and under a certain penalty to be and appear before this Honorable Court, then and there to answer all and singular the premises, and to stand to, perform and abide by any order, direction and decree which may be made against him in the premises.

And the plaintiff will ever pray, etc.

Leslie M. Swope, Henry S. Drinker, Jr., H. Gordon McCouch, Attorneys for Plaintiff. King, Barr & Robbins, 60 Broadway, New York, N. Y., of Counsel.

[fols. 16&17] *Duly sworn to by Charles C. Jordan. Jurat omitted in printing.*

[fol. 18] EXHIBIT "A" TO BILL OF COMPLAINT

I, Thomas Benedict Clarke, of the City, County and State of New York, being of sound mind and memory, do make, publish and declare the following to by my Last Will and Testament, hereby revoking all other and former wills by me at any time made:

First. I direct that all my just debts and funeral expenses be paid as soon after my decease as possible, and I direct that all transfer and inheritance taxes shall be paid out of my residuary estate.

Second. I direct my Executor to convert into money all of my estate, both real and personal, and to that end to sell at public or private sale my house No. 22 East 35th Street, New York City, and all its contents, also my property known as "Lindenland" on the main road at Hayground, Southampton Township, Long Island, New York, consisting of about fifteen acres of land with the house, garage and other buildings thereon, together with all the contents thereof, also my unimproved property on Lily Pond Lane, Easthampton, Long Island, New York. It is my wish that my Executor shall exercise its judgment as to the time and manner of effecting the sale of my property, and I advise my Executor to consult with my son Thomas Benedict Clarke, Jr., with my friend James W. Ellsworth, Esq., and with Mr. Clarence J. Dearden and Miss Alice T. Bay, President and Treasurer respectively of The Art House, Inc., as to the disposal of my artistic effects. And in order to carry out the provisions of this paragraph of my will, I hereby give and grant unto my Executor full power to sell any or all of my real property.

Third. Out of the proceeds of the sale of the property [fol. 19] referred to in Article Second and out of all other funds belonging to my estate available for that purpose I direct that the following payments be made:

1. I give and bequeath to my son Thomas Benedict Clarke, Jr., the sum of Two hundred and fifty thousand dollars ($250,000).

2. I give and bequeath to my daughter-in-law Elsie Ferguson Clarke, the sum of Twenty-five thousand dollars ($25,000).

3. I give and bequeath to each of my brothers and sisters, Mary Ellen Keys, Frances Anna Merrifield, William Addison Clarke and Paul Irving Clarke, who may survive me, the sum of Five thousand dollars ($5,000).

4. I give and bequeath to Clarence J. Dearden, the sum of Five thousand dollars ($5,000), to Alice T. Bay, the sum

of Three thousand dollars ($3,000), and to Charles X. Harris the sum of Two thousand ($2,000); the said persons being at present the President, Treasurer and Secretary respectively of The Art House, Inc., a corporation having its principal place of business at 12 East 41st Street, in the Borough of Manhattan, City of New York.

5. I give and bequeath to Alfred Thomas and Rose Thomas, his wife, who have been faithful servants in my household for many years, each the sum of One thousand dollars ($1,000) if still in my employment at the time of my death.

6. I give and bequeath the sum of Two hundred thousand dollars ($200,000) to The Farmers' Loan and Trust Company, in trust, nevertheless, for the following uses and pur-
[fol. 20] poses, that is to say: to divide the same into four equal and separate shares which shall be held, managed and disposed of as follows, respectively, to wit:

(a) One of said separate shares I direct my said trustee to hold, manage, invest and reinvest and to collect the rents, income and profits therefrom, and after deducting its commissions and all lawful and necessary expenses therefrom to pay over the net income to my sister Mary Ellen Keys during her life. Upon her death, or in case she should die before me, upon my death, to pay the principal of said separate share to her issue then surviving in equal shares per stirpes, or in default of such issue then surviving, to the issue of my sister Frances Anna Merrifield in equal shares per stirpes.

(b) The second of said separate shares I direct my said trustee to hold, manage, invest and reinvest and to collect the rents, income and profits therefrom, and after deducting its commissions and all lawful and necessary expenses therefrom to pay over the net income to my sister Frances Anna Merrifield during her life. Upon her death, or in case she should die before me, upon my death, to pay the principal of said separate share to her issue then surviving in equal shares per stirpes, or in default of such issue then surviving, to the issue of my sister Mary Ellen Keys in equal shares per stirpes.

(c) The third of said separate shares I direct my said trustee to hold, manage, invest and reinvest and to collect

[fol. 21] the rents, income and profits therefrom and after deducting its commissions and all lawful and necessary expenses therefrom to pay over the net income to my brother William Addison Clarke during his life. Upon his death, or in case he should die before me, upon my death, to pay the principal of said separate share to his issue then surviving in equal shares per stirpes, or in default of such issue then surviving, to the issue of my sisters Mary Ellen Keys and Frances Anna Merrifield in equal shares per stirpes.

(d) The fourth of said separate shares I direct my said trustee to invest and reinvest and to collect the rents, income and profits therefrom, and after deducting its commissions and all lawful and necessary expenses therefrom to pay over the net income to my brother Paul Irving Clarke during his life. Upon his death, or in case he should die before me, upon my death, to pay over said income to his wife Eleanor during her life as long as she remains unmarried. Upon her death or remarriage, after the death of my said brother, I direct my said trustee to pay the principal of said separate share to the issue then surviving of my said brother by his wife Eleanor in equal shares per stirpes. In case there shall be no such issue surviving at the time when the principal of said separate share becomes payable, I direct my said trustee to pay the said principal to the issue then surviving of my sisters, May Ellen Keys and Frances Anna Merrifield in equal shares per stirpes.

[fol. 22] Fourth. All the rest, residue and remainder of my estate I direct my Executor to divide into two equal parts, and to pay and deliver one of such equal parts to The Farmers' Loan and Trust Company, in trust, nevertheless, for the following uses and purposes, that is to say, to hold, manage, invest and reinvest and to collect the rents, income and profits therefrom, and after deducting its commissions and all lawful and necessary expenses to pay over the net income to my son Thomas Benedict Clarke, Jr., during his life. Upon his death, or in case he should die before me, upon my death, to pay the principal of said equal part of my residuary estate, to his issue then surviving in equal shares per stirpes, or in default of such issue then surviving to pay the said principal in equal shares to the Na-

tional Academy of Design of New York and the Fifth Avenue Hospital of New York City.

I direct my Executor to pay and deliver the other of such equal parts of my residuary estate to The Farmers' Loan and Trust Company, to be added to the sum which I have hereinbefore given to it by subdivision (6) of Article Third of this my will and to be held by it upon the trusts therein established.

Fifth. I hereby nominate, constitute and appoint The Farmers' Loan and Trust Company, whose principal place of business is at 22 William Street, Borough of Manhattan, New York City, Executor of this my Last Will and Testament, and Trustee of all the trusts herein created.

In witness whereof I have hereunto subscribed my name and affixed my seal at the City of New York this twelfth [fol. 23] day of May, One thousand nine hundred and twenty-two.

Thomas Benedict Clarke. (L. S.)

The foregoing instrument was at the date thereof signed, sealed, published and declared by the said Thomas Benedict Clarke, the testator therein named, as and for his Last Will and Testament in our presence and in the presence of each of us, the undersigned, and we thereupon at the same time, at his request, and in his presence, and in the presence of each other, have hereunto subscribed our names and residences as subscribing witnesses at 7 East 40th Street New York City.

Wolcott P. Robbins, 141 East 71st Street, New York City. William D. Bickham, Palmer Ave. Philipse Manor, N. Y.

[fol. 24] I, Thomas Benedict Clarke, of the City, County and State of New York, being of sound mind and memory, do hereby make, publish and declare the following as and for a Codicil to my Last Will and Testament, which bears date the 12th day of May, One thousand nine hundred and twenty-two, that is to say:

First. I hereby revoke subdivision 2 of Article Third of said Will.

Second. I hereby re-publish, ratify and confirm my said Last Will and Testament in all respects, except as altered and modified by said Codicil.

In witness whereof I have hereunto set my hand and seal this 13th day of June, One thousand nine hundred and twenty-three, in the City, County and State of New York.

Thomas Benedict Clarke. (L. S.)

The foregoing instrument was on the day of the date thereof in our presence signed, sealed, published and declared by the above named Thomas Benedict Clarke to be a Codicil to his Last Will and Testament dated May 12, 1922, and we thereupon at his request, in his presence and in the presence of each other hereunto signed our names as subscribing witnesses.

William G. Owens, 85 Audubon Ave., N. Y. City.
Wolcott P. Robbins, 911 Park Avenue, New York City.

[fol. 25] I, Thomas Benedict Clarke, of the City, County and State of New York, being of sound mind and memory do hereby make, publish and declare the following as and for a Second Codicil to my Last Will and Testament, which bears date the twelfth day of May, One thousand nine hundred and twenty-two.

First. The property described in Article Second of my said Will as "my unimproved property on Lily Pond Lane, East Hampton, Long Island, New York" has been sold by me since the date of my said Will.

I wish to amend the advice which by Article Second of my said Will I have given to my Executors as to the persons with whom they shall consult in regard to the disposal of my artistic effects by omitting the name of James W. Ellsworth, Esq., who has died since the date of said Will.

Second. I hereby revoke subdivision 3 of Article Third of my said Will and in lieu of said subdivision 3, and with the same effect as though part of said Article Third of said original Will I provide as follows:

3. I give and bequeath to my sister, Mary Ellen Keys, and to my brother, William Addison Clarke, each the sum of Five thousand dollars ($5,000).

I give and bequeath the sum of Two thousand five hundred dollars ($2,500) each to my nieces, Ruth and Pauline Merrifield, daughters of my sister, Frances Anna Merrifield.

Third. I amend subdivision 4 of Article Third of my said Will by increasing the legacy therein given to Clarence J. Dearden from Five thousand dollars ($5,000) to Six thou- [fol. 26] sand dollars ($6,000) and by increasing the legacy therein given to Alice T. Bay from Three thousand dollars ($3,000) to Five thousand dollars ($5,000). In addition to said legacy, I give and bequeath to said Alice T. Bay an annuity of One thousand dollars ($1,000) per annum, payable in equal quarterly instalments, the first payment to be made one year after my death.

Fourth. I amend subdivision 5 of Article Third of my said Will by increasing the legacy therein given to Alfred Thomas from One thousand dollars ($1,000) to One thousand five hundred dollars ($1,500).

Fifth. I give and bequeath to William J. Kain, now employed by The Art House, Inc., the sum of Two thousand dollars ($2,000).

Sixth. I give and bequeath to my cousin, Jessie Mather, of Slingerlands, Albany County, New York, the sum of Two thousand five hundred dollars ($2,500), and in addition thereto an annuity of Six hundred dollars ($600) per annum, payable in equal monthly instalments commencing one month after my death.

Seventh. My sister, Frances Anna Merrifield, having died since the date of my said Will, I direct that the fund which by subdivision 6-(b) of Article Third of my said Will is directed to be held in trust for her together with such part of my residuary estate as may be added to said fund pursuant to Article Fourth of my said Will, shall not be held in trust but shall upon my death be paid in equal shares to my nieces, Ruth and Pauline Merrifield, daughters of my said sister Frances, or if only one of them shall survive [fol. 27] me, then to the survivor of them.

Eighth. My brother, Paul Irving Clarke, having died since the date of my said Will, I amend subdivision 6-(d) of Article Third of my said Will so that the fund which was

thereby directed to be held in trust for him, together with such part of my residuary estate as may be added thereto pursuant to Article Fourth of my said Will, shall be held by my Trustee in trust and the income therefrom paid to Eleanor Clarke, widow of my said brother Paul, during her life as long as she remains unmarried. Upon her death or remarriage, I direct my said Trustee to pay the principal of said separate share to Mildred Kienbusch, daughter of my said brother Paul, now the wife of Carl Otto Kienbusch, of 12 East 74th Street, New York City. In case my said niece is not living at the time when the principal of said separate share becomes payable, I direct my said Trustee to pay the said principal to the issue then surviving of my two sisters Mary Ellen Keyes and Frances Anna Merrifield, in equal shares per stirpes.

Ninth. The Farmers Loan and Trust Company named in my said Will as Executor and Trustee, being now known as City Bank Farmers Trust Company, I hereby ratify and confirm the appointment of said City Bank Farmers Trust Company as Executor of my Last Will and Testament and Trustee of all the trusts created therein and by this Codicil.

Tenth. I hereby re-publish, ratify and confirm my said Last Will and Testament dated May 12, 1922, in all respects, except as altered or modified by the First Codicil thereto bearing date June 13, 1923, and by this Second [fol. 28] Codicil thereto.

In witness whereof I have hereunto set my hand and seal this Ninth day of January, 1931, in the City, County and State of New York.

Thomas B. Clarke. (L. S.)

The foregoing instrument was on the day of the date thereof in our presence signed, sealed, published and declared by the above named Thomas Benedict Clarke to be a Second Codicil to his Last Will and Testament dated May 12, 1922, and we thereupon at his request, in his presence and in the presence of each other hereunto signed our names as subscribing witnesses.

Wolcott P. Robbins, 215 East 72nd Street, New York City. John D. Graves, 9024 212 Place, Queens Village, New York. Robert B. Meigs, 341 W. Dudley Ave., Westfield, N. J.

[fol. 28½] [Endorsed:] Exhibit A. Last will and testament of Thomas Benedict Clarke. Dated May 12th, 1922. Codicil. Dated June 13th, 1923. Second codicil. Dated January 9th, 1931. Admitted to Probate by the New York County Surrogates Court January 27, 1931. Letters testamentary issued January 28, 1931.

[fol. 29] IN UNITED STATES DISTRICT COURT

[Title omitted]

INJUNCTION AFFIDAVIT—Filed Nov. 23, 1932

UNITED STATES OF AMERICA,
State of New York,
County of New York, ss:

Charles C. Jordan, being first duly sworn according to law, deposes and says:

1. That he is a Trust Officer of City Bank Farmers Trust Company, the plaintiff in the above entitled action; that he is authorized to make this injunction affidavit on its behalf and now so does; and that the matters herein averred, in so far as they may be on affiant's own knowledge are true and correct, and in so far as they may be upon information and belief, affiant believes them to be true and correct.

2. The above-named plaintiff was at all times hereinafter mentioned and still is a banking corporation with trust powers, duly organized and existing under the law of the State of New York.

3. Thomas B. Clarke, a citizen of the United States and a resident of, and legally domiciled in, the Borough of Manhattan, City, County and State of New York, died on the [fol. 30] 18th day of January, 1931, leaving a will and codicils thereto which were duly admitted to probate as the Last Will and Testament of said Thomas B. Clarke by the Surrogates Court of New York County, to which court jurisdiction in that behalf appertained, on the 27th day of January, 1931, and letters testamentary thereunder duly issued to the said City Bank Farmers Trust Company, and said letters still remain in full force and effect.

4. At the time of said Thomas B. Clarke's death, there was on exhibition in the Pennsylvania Museum and School of Industrial Art at Philadelphia, a collection of seventy-nine (79) early American portraits which he had assembled over a period of twenty or thirty years and had loaned to the Musuem on the occasion of the formal opening of the new Museum Building on the Parkway, in March, 1928. Said Thomas B. Clarke had no other property located in Pennsylvania at the time of his death or taxable therein.

5. Said collection of paintings had an estimated market value on the date of death of $714,750.00.

6. Affiant is informed, believes and therefore avers that said collection of early American portraits had been loaned to the Museum for the purpose of free exhibition to the public, at the request of Dr. Fiske Kimball, Director of the Museum, who was an intimate friend of the deceased, Thomas B. Clarke. No consideration was paid or intended to be paid to said Thomas B. Clarke for such loan. There was no written agreement respecting the loan, which was entirely an oral transaction; but it was understood by and between said Thomas B. Clarke and said Dr. Fiske Kimball that the pictures should be returned to the owner at any time upon his request.

7. Affiant is informed, believes and therefore avers that on several occasions subsequent to the date of the original loan, said Thomas B. Clarke suggested the return of said paintings but under pressure from Dr. Fiske Kimball to extend [fol. 31] his loan because of the great appreciation shown by the public thereof, said Clarke orally consented from time to time, to leave the paintings temporarily at the Museum, and thus, said portraits were there on display at the time of Thomas B. Clarke's death.

8. Affiant is informed by counsel for plaintiff, believes and therefore avers that under the terms of Section 1 of the Act of June 20, 1919, P. L. 521, 72 P. S. § 2301, as last amended by the Act of June 22, 1931, P. L. 690, of the State of Pennsylvania, an inheritance tax is imposed upon transfers of goods, wares or merchandise, "within this Commonwealth" belonging to a non-resident, at rates of 2 and 10% depending upon the relationship of the heirs, legatees and beneficiaries.

9. Under the Will of said Thomas B. Clarke, deceased, the aforesaid collection of portraits passed as a part of his residuary estate to lineals and collaterals so that, if said property had a taxable situs in Pennsylvania at the time of death, a Pennsylvania inheritance tax would arise in a sum exceeding $3,000.00.

10. Affiant is informed by counsel for plaintiff, believes and therefore avers, that under the terms of the Act of April 9, 1929, P. L. 343, Article XIV, sec. 1401, 72 P. S. § 1401, said inheritance tax is apparently a lien on the property transferred subject to such tax, from the date of settlement until the tax is settled or satisfied, such lien being limited to the property chargeable therewith.

11. Affiant is informed by plaintiff's counsel, believes and therefore avers, that it is the duty of the defendant, Leon D. Metzger, to have the aforesaid property of plaintiff appraised, assessed and an inheritance tax thereon collected under the terms of the statute aforementioned and under the provisions of the Pennsylvania statutes providing for the collection of inheritance taxes on the estates of non-residents. Whether this be his legal duty or not, said Leon D. Metzger is actually proceeding at the present time to appraise, assess and collect such a tax thereon.

[fol. 32] 12. Affiant is informed by plaintiff's counsel, believes and therefore avers, that it is the duty of the defendant, William A. Schnader, to enforce the statutes of Pennsylvania, and in particular the statute aforementioned which imposes a transfer inheritance tax upon property temporarily within the Commonwealth at the time of the owner's death and to proceed by suit at law or in equity to collect such taxes. Whether this be his legal duty under the statute or not, said William A. Schnader is threatening at the present time to proceed against the plaintiff for the collection of inheritance taxes upon the collection of portraits aforementioned.

13. On March 25, 1931, plaintiff, through its attorneys, disclosed the facts involved in this case to Mr. Linn L. Reist, the proper official in the Department of Revenue in charge of the appraisal, assessment and collection of inheritance taxes on non-resident estates, and by letters dated March 26th and April 27, 1931, to the defendant, William A. Schnader.

14. On April 7, 1931 plaintiff's attorneys in Philadelphia received the following notice:

"Commonwealth of Pennsylvania, Department of Revenue

Harrisburg, April 6th, 1931.

"This is full and sufficient notice that an official appraisement of the Pennsylvania assets belonging to the estate of Thomas B. Clarke, late of New York City, will be held in the office of the Secretary of Revenue on Monday [morning],* April 20th, 1931, at [eleven]* o'clock. P. M. 2-30

(S.) Harry T. Shadduck, Appraiser. Harry T. Shadduck."

[fol. 33] 15. Under date of April 13, 1931 defendant, William A. Schnader, addressed a letter to plaintiff's counsel in Philadelphia, insisting upon making a formal record by filing a return with the Department of Revenue and appearing before the appraiser at the hearing set and described in the preceding paragraph.

16. Pursuant to the said instructions of the defendant, William A. Schnader, plaintiff filed under protest with the Department of Revenue at Harrisburg, Pennsylvania, on April 20, 1931 a so-called "Application for Appraisement and Waiver of Transfer Inheritance Tax Provisions"; that the material parts of said return are as follows:

"5. That the total gross value of the real estate and the goods, wares and merchandise within the Commonwealth of Pennsylvania, and of the shares of stock of corporations of the Commonwealth of Pennsylvania and National Banking Associations located therein, of which the decedent died possessed, amounted to the sum of $—, a complete inventory whereof is hereto attached as Schedule D. See, however, item included in Schedule D under protest."

"Schedule D

"79 Portraits by early American artists loaned to Pennsylvania Museum of Art at Philadelphia, listed and de-

[* Erased in copy.]

scribed in appraisal affidavit of Clarence J. Dearden hereto annexed $714,750.00.

"Some time prior to his death the decedent loaned the above described paintings to the Pennsylvania Museum of Art at Philadelphia for purposes of public exhibition. These paintings have been and still are exhibited in connection with a number of other portraits by early American artists which are the property of The Art House, Inc., a New York corporation controlled by the decedent. The loan of the decedent's paintings was made at the request of Mr. Fiske Kimball, Director of the Pennsylvania Museum, and the arrangements were informal. No written contract or other agreement was made and no definite time was fixed as the duration of the loan. No consideration was paid to Mr. Clarke for the loan. It was understood that Mr. Clarke could recall the paintings at any time. It happened that the paintings were still physically located in Philadelphia at the time of decedent's death, but it is respectfully submitted that they were only temporarily in the State of Pennsylvania and had no actual situs therein for purpose of taxation.

"The said 79 paintings were the only property of the decedent within the Commonwealth of Pennsylvania at the time of his death."

17. On April 20, 1931 the scheduled hearing was held in Harrisburg by Harry T. Shadduck, an appraiser in the [fol. 34] Department of Revenue, since resigned, at which hearing plaintiff was represented by counsel and denied the right of the Commonwealth of Pennsylvania to appraise, assess and collect a tax upon the aforesaid collection of paintings temporarily in the Commonwealth of Pennsylvania at the time of decedent's death; that said appraiser referred the question of taxability of the aforesaid paintings to the Department of Justice, of which defendant, William A. Schnader, is head, for a determination; that pending such decision, he made no attempt to appraise the taxable value of the estate but postponed said hearing from day to day to a future undetermined day to be held after the Department of Justice had passed upon the legality of the proposed tax, and after notice to the parties.

18. Throughout the spring of 1932, in response to repeated requests of plaintiff for an immediate determina-

tion of tax liability, the defendant William A. Schnader, orally advised plaintiff through its counsel that the Department of Justice was withholding determination of the legal question of liability pending an attempt on its part to work out a reciprocity agreement with the State of New York concerning the taxation of moveable tangible property under circumstances such as those involved in this case.

19. Meantime, plaintiff as Executor of the Estate of Thomas B. Clarke, deceased, had taken up the question of tax liability with the proper officials of New York State and was advised in a letter dated July 11, 1931 from the New York State Tax Commission that the said collection of 79 paintings had its situs in New York and was subject to the New York estate tax and that an extension of time to pay said tax pending the determination of the legal question involved in Pennsylvania had been refused. Pursuant to the demand made in said letter and in order to avoid the severe penalties imposed by the New York statute for non-payment within a year and a half of decedent's death, plaintiff paid to the State of New York on July 15, 1932 an [fol. 35] estate tax amounting to $69,500 on the basis of a return which included therein the aforesaid collection of 79 paintings at the said value thereof in the amount of $714,500.00.

20. Immediately after such payment to New York, plaintiff again through its counsel took up the question with defendant, William A. Schnader, who orally advised plaintiff that its claim of non-taxability in Pennsylvania would be denied.

21. Affiant is informed by plaintiff's counsel, believes and therefore avers, that if the said section 1 of the Act of June 20, 1919, P. L. 521, as amended (paragraph 9, supra) be construed to impose an inheritance tax upon the transfer by death of the non-resident owner thereof, of the said 79 paintings, merely because they were temporarily "within this Commonwealth" at the time of decedent's death, it is unconstitutional in that it deprives the plaintiff of its property without due process of law and denies to the plaintiff the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

22. Affiant is informed by plaintiff's counsel, believes and therefore avers, that if said statute be construed as not applying to property temporarily within the Commonwealth at death, then the threatened appraisal, assessment and collection by the defendants of said inheritance tax unconstitutionally deprives the plaintiff of its property without due process of law and denies to the plaintiff the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

23. The threat of the said appraisement, assessment and collection of the aforesaid inheritance tax by the defendants and the unlawful failure and refusal of the defendant, Leon D. Metzger, to issue a waiver of taxes in this estate [fol. 36] for over a year and a half, has and is causing immediate irreparable injury to plaintiff in that it is seriously interfering with the proper administration of the Thomas B. Clarke Estate in the Surrogate's Court of New York and is preventing distribution of the estate to the legatees thereof who are entitled thereto, and is forcing the plaintiff as executor to maintain large cash reserves at a low rate of interest to cover possible taxes in Pennsylvania and the costs of litigation there, including the cost of bonds and of attorneys' fees; and in that the threatened tax constitutes a possible lien and, therefore, cloud on the title of plaintiff to the aforesaid 79 paintings and, consequently, interferes with the sale thereof as provided for in the will of testator.

24. Affiant is informed by plaintiff's counsel, believes and therefore avers, that it has no adequate remedy at law in that the statutes of Pennsylvania make no provision for bringing suit in the courts of that state for the refund of inheritance taxes overpaid but only provide for an application for a refund to an administrative board from whose decision there is no appeal and even if favorably decided by such board, no interest is allowed on any refund granted; in that the only remedy provided by the statutes of Pennsylvania prior to payment is a statutory form of appeal to the Dauphin County Court where a bond must be posted covering the full amount of tax and costs of suit and there is no provision for the restitution of the cost of such bond, which, in this case, would amount to a large sum of money, even if plaintiff should succeed before such Court;

and in that the plaintiff has no adequate remedy at law in the federal courts, to which it is entitled because of diversity of citizenship between the parties to this suit.

All of the foregoing facts affiant avers he expects the plaintiff to prove at the hearing in this cause.

Charles C. Jordan.

Sworn to and subscribed before me this 18th day of November, 1932. John D. Graves, Notary Public, Queens Co. No. 2159, Reg. No. 4914. Cert. filed N. Y. Co. 473, Reg. (Certificate of Court Clerk) No. 3-G-318. Comm. ex. 3/3/33.

Clerk's certificate to notary public omitted in printing.

[fol. 37] IN UNITED STATES DISTRICT COURT

[Title omitted]

INJUNCTION AFFIDAVIT—Filed Nov. 23, 1932

COMMONWEALTH OF PENNSYLVANIA,
County of Philadelphia, ss:

Fiske Kimball, being duly sworn according to law, deposes and says that he is Director of the Pennsylvania Museum of Art, Fairmount Park, Philadelphia, Pennsylvana, and has so been connected with the said institution from the year 1925; that the following is a true account of his relations with Mr. Thomas B. Clarke, Deceased, of New York City, N. Y., in connection with the collection of early American portraits on exhibition in the Museum at the time of Mr. Clarke's death.

I was intimately acquainted with the late Mr. Thomas B. Clarke from about the year 1920 down to the date of his death on January 18, 1931. I knew him in New York, where I lived for a time prior to coming to Philadelphia in 1925. I lunched with him frequently at "The Brook" club and we maintained a close friendship which was fostered by our mutual intereets in the realm of art.

The new Art Museum was to open its doors in March, 1928, and I was anxious to supplement the exhibition of

[fol. 38] paintings with loans from outside sources. I knew about the collection of early American portraits which had been assembled by Mr. Clarke and had seen various selected groups from the collection at different times. The thought occurred to me that Mr. Clarke might lend his collection to the Museum as a personal favor to me and to assist in making the opening of the Museum an occasion of consequence in the world of art. I, therefore, made a social visit to Mr. Clarke in the month of November, 1927, and, very much to his surprise, requested that he lend his collection of portraits to the Museum temporarily for the purposes stated. I am sure that Mr. Clarke never contemplated making this loan prior to my request and I feel confident that he would not have made the loan were it not for our close friendship. After considering the matter for some time Mr. Clarke very kindly agreed to lend the pictures to the Museum at its opening for free exhibition to the public. There was no written agreement respecting the loan, which was entirely an oral transaction, except that the Museum issued its usual printed loan receipt, a copy of which is appended. There was no consideration for the loan. The term originally contemplated was about six months, although there was no definite understanding regarding the matter. It was understood that the pictures should be returned to Mr. Clarke at any time upon his request. The cost of shipping the pictures to Philadelphia, and the insurance thereon, was borne under an appropriation by the City of Philadelphia for the operation of the Museum, which is a non-profit corporation partially supported by the City of Philadelphia and the Commonwealth of Pennsylvania. The Museum considered the loan a great service to it, and elected Mr. Clarke an Honorary Benefactor. On March 26, 1928, I wrote Mr. Clarke the following letter:

"The Pennsylvania Museum

Office of the Director, Memorial Hall, Fairmount Park

March 26, 1928.

"DEAR MR. CLARKE: At its recent meeting our Museum Committee, by special resolution, charged me with the agreeable task of conveying to you formally the thanks and appreciation of the Committee for your magnificent act in

[fol. 39] lending to the Museum for its inaugural exhibition your unrivalled collection of early American paintings.

The Committee fully appreciates how great was the generosity of this loan of a collection never seen or shown before in its entirety, and one which surpasses in importance any other collection of American paintings, not only in private hands, but even in the hands of the greatest public institutions. I scarcely need to tell you how much delight it gives me to transmit this resolution to you, and to say how happy and proud we are on this day when the Museum is officially opened to have the Clarke collection as one of its principal treasures.

Sincerely yours, Fiske Kimball, Director.

Thomas B. Clarke, Esq., 22 East 35th Street, New York."

At the same time I secured substantial loans from other outside sources, largely through similar personal connections, to enrich the display at the Museum.

Not only this collection but other collections lent to the Museum at that time were retained by us longer than the original six months contemplated and, in fact, most of them were still on exhibition in the Museum at the time of Mr. Clarke's death. It is very common for loans to museums to be thus extended, with no intention of their being permanent. Recently, I ran through our records and found that in the case of twenty-six collections so lent and returned, the duration of the loan varied from one to forty years, the average time for the twenty-six collections being ten years. I purposely did not remind the lenders to the inaugural exhibition to withdraw their loans, and, if they brought the matter up, I would press them to extend their loans because of the great appreciation shown by the public in visiting the Museum. This was particularly true of the Clarke collection and from time to time I would ask Mr. Clarke to allow the pictures to continue to remain on view with us.

Mr. Clarke was a prominent figure in the world of art and was one of the best known persons in New York City. He was at one time Sheperd of the Lambs Club and was [fol. 40] founder of "The Brook" Club. He had been a collector of Chinese porcelains and other works of art prior to the time he started collecting American historical portraits, which ultimately absorbed all his interest and led him to sell other objects, so that he could purchase more and finer

portraits. It was well known among all persons interested in such subjects that he had this splendid collection of early American portraits. He had permitted practically all of them to be exhibited in selected groups from time to time in New York at the Century Club and the Union League Club.

As indicated heretofore, I have, by reason of my New York and other outside associations, been able to secure substantial loans of works of art from owners residing outside of the State of Pennsylvania. The value of such property so lent from time to time, much of which is still on exhibition in the Museum, has amounted to two or three million dollars at least. While such loans are customary among patrons of art, the Pennsylvania Museum of Art has perhaps been unsually successful, both as to the quantity and quality of pictures and other works of art, which it has thus secured temporarily from foreign owners, and no conclusion has even been drawn heretofore that such loans were anything but what they purported to be—temporary deposits for the benefit of the public interested in works of art.

(S.) Fiske Kimball.

Sworn to and subscribed before me this 17th day of November, 1932. My commission expires Mar. 2, 1933. W. A. Schrader, Notary Public. (Seal.)

[fol. 41] In United States District Court

[Title omitted]

Motion for Interlocutory Injunction—Filed Nov. 23, 1932

To the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania:

Upon the bill of complaint herein and upon the annexed affidavits of Charles C. Jordan, verified on the 18th day of November, 1932, and of Fiske Kimball, verified on the 17th day of November, 1932, and upon proceedings had herein, City Bank Farmers Trust Company, Executor under the Will of Thomas B. Clarke, deceased, the complainant above

named makes its application to your Honors for a writ of injunction enjoining and restraining, pending the final judgment in this action, and until the further order of this court, the defendants and each of them, and their and each of their deputies, officers, agents, servants and employees, and any and every person acting under and by virtue of their authority in the Department of Justice or in the Department of Revenue of the Commonwealth of Pennsylvania, from in any way completing or attempting to complete the appraisal, assessment and collection of inheritance taxes from the plaintiff now being undertaken under the alleged authority of the Act of June 20, 1919, P. L. 521, as amended and supporting statutes, and from prosecuting or bringing any action at law or in equity against the plaintiff for the collection of said taxes and [fol. 42] from refusing to issue a tax waiver to plaintiffs covering the property set forth in said bill of complaint, and complainant prays your Honors to call to your Honors' assistance, to hear and determine this application, two other judges in accordance with the provisions of section 266 of the Judicial Code, and to expedite the hearing of this application, and set the same down for a hearing at the earliest practical date; and for such other and further relief as to the court may seem just and proper in the premises:

Dated at Philadelphia, Nov. 23, 1932.

(S.) Leslie M. Swope, (S.) Henry S. Drinker, Jr., Attorneys for Plaintiff, 1429 Walnut Street, Philadelphia, Pa.

[fol. 43] IN UNITED STATES DISTRICT COURT

[Title omitted]

Ex Parte Order

RESTRAINING ORDER—Filed Nov. 25, 1932

This cause came on to be heard upon the motion of City Bank Farmers Trust Company, Executor under the Will of Thomas B. Clarke, Deceased, the plaintiff in the above entitled cause, for an interlocutory injunction against the Honorable William A. Schnader, Attorney General of the Commonwealth of Pennsylvania, and the Honorable Leon

D. Metzger, Secretary of Revenue of the Commonwealth of Pennsylvania, the defendants in the above cause, on the verified bill of complaint and on the affidavits of Charles C. Jordan verified the 18th day of November, 1932, and of Fiske Kimball, verified on the 17th day of November, 1932, and it appearing to this court that said Bill of Complaint seeks an interlocutory judgment restraining the enforcement of the Act of June 20, 1919, P. L. 521, as amended, by restraining the acts of the Honorable William A. Schnader, Attorney General, and of the Honorable Leon D. Metzger, Secretary of Revenue, in the enforcement of such statute upon the grounds of the unconstitutionality of said statute and on the unconstitutionality of any appraisement, assessment and collection of inheritance taxes against plaintiff pursuant to such statute, as provided by Section 266 of the Judicial Code, it is ordered, adjudged and decreed as follows:

[fol. 44] 1. The Honorable William H. Kirkpatrick, Judge of the above court, hereby calls to his assistance to hear and determine the application for an interlocutory injunction in this case the Honorable J. Whitaker Thompson, Judge of the Circuit Court of Appeals for the Third Circuit, and the Honorable Oliver B. Dickinson, Judge of the District Court of the United States for the Eastern District of Pennsylvania.

2. It is further ordered, adjudged and decreed, that said defendants appear to show cause, if any they have, on December 2, 1932, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, in Room —, Federal Court Building, Philadelphia, why an interlocutory injunction should not issue as prayed for in said bill of complaint, enjoining said defendants and each of them, and their and each of their deputies, officers, agents, servants and employees, and any and every person acting under and by virtue of their authority in the Department of Justice or in the Department of Revenue of the Commonwealth of Pennsylvania, from in any way completing or attempting to complete the appraisal, assessment and collection of inheritance taxes from the plaintiff now being undertaken, under the alleged authority of the Act of June 20, 1919, P. L. 521, as amended, and supporting statutes, and from prosecuting or bringing

any action at law or in equity against the plaintiff for the collection of said taxes and from refusing to issue a tax waiver to plaintiffs covering the property set forth in said Bill of Complaint.

3. It appearing that immediate and irreparable damage will be caused to said plaintiff by reason of the threat of the said appraisement, assessment and collection of the aforesaid inheritance tax by the defendants and the failure and refusal of the defendant, Leon D. Metzger, to issue a waiver of taxes in this estate, in that such threat and acts are seriously interfering with the proper administration of the Thomas B. Clarke Estate in the Surrogate's Court of New York and are preventing distribution of the estate, and [fol. 45] are forcing the plaintiff as executor to maintain large cash reserves at a low rate of interest to cover possible taxes in Pennsylvania and the costs of litigation there, including the cost of bonds and of attorneys' fees and in that, once appraised and assessed, the threatened tax constitutes a possible lien and, therefore, cloud on the title of plaintiff to the property involved and interferes with the proposed sale thereof, unless a temporary restraining order is issued ex parte and without notice against said defendants until the hearing of said application for an interlocutory injunction, it is further ordered, adjudged and decreed that said, the Honorable William A. Schnader, Attorney General, and the Honorable Leon D. Metzger, Secretary of Revenue, be enjoined from in any way completing or attempting to complete the appraisal, assessment and collection of inheritance taxes from the plaintiff now being undertaken under the alleged authority of the Act of June 20, 1919, P. L. 521, as amended, and supporting statutes, and from prosecuting or bringing any action at law or in equity against the plaintiff for the collection of said taxes covering the property set forth in said Bill of Complaint, until said hearing on said application for an interlocutory injunction. Bond sur restraining order in $1,000 to be filed.

Dated at Philadelphia, November 25, 1932, at 10 o'clock A. M.

(S.) W. H. Kirkpatrick, District Judge.

[fols. 46 & 47] Bond on restraining order for $1,000.00, approved and filed November 25, 1932, omitted in printing.

[fol. 48] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed Dec. 19, 1932

To the Honorable the Judges of the said Court:

William A. Schnader and Leon D. Metzger, the defendants above named, saving and reserving to themselves all [fol. 49] benefit and advantage of exceptions to the manifold errors, uncertainties and other imperfections in the plaintiff's Bill of Complaint, for answer thereto respectfully show:

1. The averments of the first paragraph of the Bill of Complaint are admitted.

2. The averments of the second paragraph of the Bill of Complaint are admitted.

3. The averments of paragraph 3 of the Bill of Complaint are admitted.

4. The averments of paragraph 4 of the Bill of Complaint are admitted.

5. The averments of paragraph 5 of the Bill of Complaint are admitted.

6. Defendants are advised and believe that the facts stated in paragraph 6 of the Bill of Complaint are true. In further answer defendants aver that prior to their shipment to the Pennsylvania Museum in Philadelphia in March, 1928, only five of the portraits owned by Thomas B. Clarke had been stored in Mr. Clark's residence at 22 East Thirty-fifth Street, New York City. Ten of these portraits had been on exhibition at the Century Association, New York City, and the remaining 63 portraits had been stored in the warehouse of the Lincoln Storage Warehouse Company, a corporation engaged in the business of storing goods for hire, in New York City. When the pictures were sent to the Pennsylvania Museum in Philadelphia, Mr.

Clarke surrendered his lease for storage space at the warehouse of the Lincoln Storage Warehouse Company, and from that time until the date of his death on January 18, [fol. 50] 1931, did not pay any rentals for storage space in New York, or any other storage charges on account of these pictures. Although it would have been possible for Mr. Clarke at any time to re-engage storage space at the Lincoln Storage Warehouse Company, or at other warehouses in the City of New York, Mr. Clarke did not own, lease, or in any other way reserve or control, any storage space adequate for the storage of these pictures in New York City during the period from March, 1928, until his death on January 18, 1931.

On April 29, 1929, Mr. Clarke lent four of the portraits to the Virginia Historical Society for an exhibition at Richmond, Virginia, but these four portraits were returned to the Pennsylvania Museum in Philadelphia on May 25, 1929. With this exception, Thomas B. Clarke permitted all of the 79 portraits to remain at the Pennsylvania Museum in Philadelphia continuously from March, 1928, until the date of his death on January 18, 1931.

7. In answer to the averments of paragraph 7 of the Bill of Complaint, defendants aver that the collection of 79 portraits owned by Thomas B. Clarke had an estimated value on the date of his death of at least $714,750.

8. Defendants are advised and believe that the facts averred in paragraph 8 of the Bill of Complaint are true. In further answer defendants aver that Thomas B. Clarke permitted the 79 portraits to remain at the Pennsylvania Museum in Philadelphia from March, 1928, until his death [fol. 51] on January 18, 1931. Defendants further aver that about a year after the pictures had been placed on exhibition at the Pennsylvania Museum in Philadelphia, Thomas B. Clarke, at the solicitation of Dr. Fiske Kimball, Director of the Museum, wrote to Dr. Kimball stating that if the latter could secure a donor who would present Mr. Clark's entire collection of early American portraits (consisting of these 79 portraits, and 85 other portraits owned by the Art House, a New York corporation whose entire capital stock was owned or controlled by Mr. Clarke, and which were also on exhibition at the Pennsylvania Museum) to the Museum, he would sell the collection as a whole to

such donor at a stated price. It was understood between Mr. Clarke and Dr. Kimball that Mr. Clarke would allow the portraits to remain at the Museum in Philadelphia during such reasonable time as Dr. Kimball might require to find such proposed donor. Subsequently, on May 21, 1930, Mr. Clarke again wrote to Dr. Kimball stating that the above arrangement would terminate on June 17, 1930. Defendants further aver, however, that even after the expiration of the arrangement permitting Dr. Kimball to find a donor to present the pictures to the Pennsylvania Museum in Philadelphia, and until the time of Mr. Clarke's death on January 18, 1931, Thomas B. Clarke was willing to dispose of his pictures to any purchaser who would buy the collection as a whole for presentation to the Pennsylvania Museum or to a substantially similar institution, and who would pay the price set upon it by Mr. Clarke.

In further answer defendants aver that at no time prior to his death on January 18, 1931, did Mr. Clarke make any definite plans for the return of these pictures to New York, [fol. 52] or (except as set forth in paragraph 6 of this Answer) for their removal from the Pennsylvania Museum of Art to any other place.

9. Defendants are advised and believe that the facts averred in paragraph 9 of the Bill of Complaint are true. In further answer defendants aver that during the period from March, 1928, until the date of his death on January 18, 1931, Thomas B. Clarke never made any definite plans for the return of his paintings to New York, or (except as set forth in paragraph 6 of this Answer) for their removal from the Pennsylvania Museum of Art in Philadelphia to any other place. At the time of the death of Thomas B. Clarke on January 18, 1931, the pictures owned by him (excepting the four portraits which had been sent to Richmond, Virginia, for about a month in 1929, as set forth in paragraph 6 of this Answer) had been physically located within the Commonwealth of Pennsylvania for a period of two years and ten months.

10. Defendants are advised and believe that the facts averred in paragraph 10 of the Bill of Complaint are true. Defendants deny, however, that any of these averments are in any way material to the issues presented by the plaintiff's Bill of Complaint.

11. The averments of paragraph 11 of the Bill of Complaint are admitted.

12. The averments of paragraph 12 of the Bill of Complaint consist of quotations from statutes of the Commonwealth of Pennsylvania and certain conclusions of law derived therefrom by plaintiff. Therefore, defendants are [fol. 53] advised by counsel, believe and aver that they are not required to answer the averments of paragraph 12 of the Bill of Complaint.

13. Defendants are advised by counsel, believe and, therefore, aver that the averments of paragraph 13 of the Bill of Complaint are conclusions of law which do not require any answer.

14. Defendants are advised by counsel, believe and, therefore, aver that the averments of paragraph 14 of the Bill of Complaint are conclusions of law which do not require any answer by the defendants.

15. Defendants admit that the plaintiff, through its attorneys, conferred with a representative of the Department of Revenue on or about March 25, 1931, and at that time made certain statements to the Department of Revenue upon which plaintiff based a claim for exemption from tax. Defendants also admit that notice of plaintiff's claim was given to the defendant, William A. Schnader, by letters dated March 26 and April 27, 1931.

16. The averments of paragraph 16 of the Bill of Complaint are admitted.

17. The averments of paragraph 17 of the Bill of Complaint are admitted.

18. Defendants admit that plaintiff filed under protest with the Department of Revenue at Harrisburg, on or about April 20, 1931, a so-called "Application for Appraisement and Waiver of Transfer Inheritance Tax Pro- [fol. 54] visions", and that the said application contained the statements quoted in paragraph 18 of the Bill of Complaint.

19. The averments of paragraph 19 of the Bill of Complaint are admitted.

20. The averments of paragraph 20 of the Bill of Complaint are admitted. Defendants deny, however, that the facts averred therein are material to the issues presented by plaintiff's Bill of Complaint.

21. Defendants are advised and believe that the facts averred in paragraph 21 of the Bill of Complaint are true. Defendants deny, however, that any of the facts so averred are in any way material to the issues presented by the plaintiff's Bill of Complaint. In further answer defendants aver that at the time of the death of Thomas B. Clarke on January 18, 1931, the 79 paintings were physically located in Pennsylvania, and had been on exhibition within the Commonwealth of Pennsylvania for a period of nearly three years. Defendants aver that, under the facts set forth in the Bill of Complaint and in this Answer, these 79 portraits had an actual situs in Pennsylvania, and that they were subject to the transfer inheritance tax imposed by the Commonwealth of Pennsylvania, and were not subject to any such transfer inheritance tax in the State of New York. Defendants further aver that the plaintiff paid such transfer inheritance tax to the State of New York with full knowledge of the possibility that a transfer inheritance tax upon these paintings might be demanded by the Commonwealth of Pennsylvania.

[fol. 55] 22. The averments of paragraph 22 of the Bill of Complaint are admitted.

23. Defendants are advised, believe and, therefore, aver that the allegations contained in paragraph 23 of the Bill of Complaint are argumentative, and contain only conclusions of law, which do not require any answer by defendants. Defendants aver, however, that no attempt has been made by them or by any other representatives of the Commonwealth of Pennsylvania in this case to interpret Section 1 of the Act of June 20, 1919, P. L. 521, as amended, as imposing an inheritance tax upon the transfer by death of the nonresident owner thereof of any property which was only temporarily within the Commonwealth of Pennsylvania at the time of the death of the owner thereof. Defendants aver that the 79 paintings owned by Thomas B. Clarke at the time of his death had been physically located within the Commonwealth of Pennsylvania for a period of nearly three years prior to Mr. Clarke's death. Defend-

ants further aver that, under the facts set forth in the Bill of Complaint and in this Answer, these 79 paintings were not temporarily within the Commonwealth of Pennsylvania, but had acquired an actual situs in Pennsylvania. Defendants deny that Section 1 of the Act of June 20, 1919, P. L. 521, as amended, in any way deprives the plaintiff of its property without due process of law, or in any way denies to the plaintiff the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

24. Defendants are advised, believe, and therefore aver that the averments contained in paragraph 24 of the Bill [fol. 56] of Complaint are argumentative, and contain only conclusions of law, which do not require any answer by the defendants. Defendants deny, however, that the appraisal, assessment and collection by the Commonwealth of Pennsylvania of an inheritance tax upon the transfer of the 79 paintings owned by Thomas B. Clarke, and located within the Commonwealth of Pennsylvania at the time of his death, unconstitutionally deprives the plaintiff of its property without due process of law, or denies to the plaintiff the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States. In further answer defendants aver that under the facts set forth in the Bill of Complaint and in this Answer the 79 paintings owned by Mr. Clarke were not temporarily within the Commonwealth of Pennsylvania at the time of his death, but had acquired an actual situs in Pennsylvania. The pictures had been physically located within the Commonwealth of Pennsylvania for nearly three years prior to Mr. Clarke's death. At no time prior to his death on January 18, 1931, did Thomas B. Clarke make any definite plans for the return of the pictures to New York, or (except in the case of the 4 portraits sent to Richmond, Virginia, for one month in 1929, and subsequently returned to Philadelphia, as set forth in paragraph 6 of this Answer) for their removal from the Pennsylvania Museum in Philadelphia to any other place.

25. Defendants are advised and believe that the averments of paragraph 25 of the Bill of Complaint consist of inferences of fact and conclusions of law which do not require any answer by defendants.

[fol. 57] 26. Defendants deny that the plaintiff has no adequate remedy at law. On the contrary, defendants aver that the plaintiff has a full, adequate and complete remedy at law duly provided by the statutes of the Commonwealth of Pennsylvania permitting the plaintiff to appeal to the Court of Common Pleas of Dauphin County from any assessment made against it by the defendants.

27. In further answer to plaintiff's Bill of Complaint, defendants aver that this suit is brought against defendants in their official capacities as Attorney General and Secretary of Revenue, respectively, of the Commonwealth of Pennsylvania, and that, therefore, the suit is brought against the Commonwealth of Pennsylvania, contrary to the provisions of the Eleventh Amendment to the Constitution of the United States of America. Therefore, defendants aver that this Honorable Court is without jurisdiction to entertain the plaintiff's suit.

Wherefore defendants pray that they may be hence dismissed with their reasonable costs and expenses in this behalf incurred.

Wm. A. Schnader, Leon D. Metzger.

[fol. 58] *Duly sworn to by Leon D. Metzger. Jurat omitted in printing.*

[fol. 59] In United States District Court

[Title omitted]

Stipulation as to Certain Facts—Filed Jan. 5, 1933

It is stipulated and agreed between counsel for plaintiff and defendants in the above case that the case may be disposed of by the Court as of final hearing on the facts alleged in the Bill and Answer with the following additional facts, which are, for the purposes of this case, admitted by both parties to be correct:

Thomas B. Clarke, the testator, was 82 years of age at the time of his death; it was understood between Mr. Clarke [fol. 60] and Dr. Kimball that the Philadelphia Museum of Art should pay all expenses directly incident to Mr. Clarke's loaning the pictures to the Museum, as averred in the Bill, and the Museum actually did pay the expenses of transportation from New York, including insurance in

transit; the New York law provides a procedure for refund of inheritance taxes improperly paid, but this procedure does not provide for a refund of interest on the tax; at the time of Mr. Clarke's death all the beneficiaries of his Estate were non-residents of Pennsylvania. Prior to the loan to the Philadelphia Museum of Art here involved, Mr. Clarke had permitted practically all of these portraits to be exhibited in selected groups from time to time in New York at the Century Club and at the Union League Club, of each of which clubs Mr. Clarke was a member. In this way all the 79 pictures had been exhibited in New York, in each case with selected groups of the 85 portraits belonging to Art House, Inc., but not as a unit nor in connnection with the entire other 85 pictures belonging to Art House, Inc. The number of portraits so exhibited from the personally owned collection of 79 never exceeded fifteen at any one time, although, by reason of additions from Art House, Inc., the entire group so exhibited was usually larger. For several years before 1928, the greater part of the pictures had been in storage, selected groups going out and in for exhibition purposes.

H. S. Drinker, Jr., Attorney for Plaintiff. Wm. A. Schnader, Lucien B. Carpenter, Attorneys for Defendants.

December 20, 1932.

[fol. 61] In United States District Court for the Eastern District of Pennsylvania, September Term, 1932

In Equity. No. 7395

City Bank Farmers Trust Company, Executor under the Will of Thomas B. Clarke, Deceased,

vs.

The Honorable William A. Schnader, Attorney General of the Commonwealth of Pennsylvania, and The Honorable Leon D. Metzger, Secretary of Revenue of the Commonwealth of Pennsylvania

Before Thompson, C. J.; Dickinson, and Kirkpatrick, D. JJ.

Opinion sur Pleadings and Proofs—Filed Mar. 24, 1933

The plaintiff, the executor of a non-resident decedent, has brought this suit in equity to restrain the Pennsyl-

vania taxing authorities from appraising for inheritance tax a collection of paintings, the property of the decedent, physically located within the state of Pennsylvania, and from taking steps to collect the tax. The plaintiff alleges that the pictures were in Pennsylvania for a temporary and transient purpose only and are not taxable there.

The basis for equity jurisdiction is asserted in paragraph 25 of the bill. It is there set forth that the threatened collection of the tax is causing immediate and irreparable injury in that it is (1) seriously interfering with the administration of the estate and delaying distribution, (2) [fol. 62] compelling the plaintiff to maintain large cash reserves at low interest rates against the possibility of having to pay the tax, and, (3) creating a "possible lien" and therefore clouding the title of the plaintiff to the paintings.

The answer does not challenge these statements but merely states that they are inferences of fact and conclusions of law which do not require answer. The answer does however aver that the plaintiff has an adequate remedy at law and specifies the right of appeal to the state courts from the assessment, granted by the Pennsylvania statute.

The law is settled beyond all question that there must be some ground for invoking the equity powers of the court, other than the illegality or unconstitutionality of the tax. Boise Artesian etc. Water Co. vs. Boise City, 213 U. S. 276. Such ground among others has been found in former decisions in the creation of a cloud upon title (Shaffer vs. Carter, 252 U. S. 37; Union Pacific Railway Company vs. Cheyenne, 113 U. S. 516; Pacific Express Co. vs. Seibert, 142 U. S. 339; Ogden City vs. Armstrong, 168 U. S. 224; Ohio Tax Cases, 232 U. S. 576; Green vs. Louisville & Interurban R. R. Company, 244 U. S. 499.)

No decision has been called to our attention in which a possible lien upon a specific article or articles of personal property has been held to constitute a cloud upon title which will warrant injunctive relief. In all the cases cited real estate was involved and the clearing of real estate titles was the historical basis of this branch of the jurisdiction. In many of the cases the unpaid tax became, by the [fol. 63] law of the state, a lien upon all of the taxpayer's property within the state, whether subject to the tax or not.

That this would cause irreparable injury, particularly where the plaintiff is a railroad company or, as in Shaffer vs. Carter, supra, the owner of numerous gas and oil mining leases, is plain. That situation does not exist here however. The Pennsylvania Act of April 9, 1929, Purdon, Title 72, Sec. 1401, imposing a lien for unpaid taxes expressly provides, "but the lien of transfer inheritance taxes shall be limited to the property chargeable therewith".

Whether the want of an adequate remedy at law be viewed as constituting in itself a ground of equitable jurisdiction or whether the existence of such remedy be taken as limiting a jurisdiction which might otherwise attach, this court cannot proceed if there is such a remedy. The provision of R. S. 70, "Suits in equity shall not be sustained in any court of the United States where a plain, adequate and complete remedy may be had at law" must be observed.

"The reason for this guiding principle is of peculiar force in cases where the suit, like the present one, is brought to enjoin the collection of a state tax in courts of a different, though paramount sovereignty. The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it." Matthews vs. Rodgers, 284 U. S. 521, 525.

"If it be quite obvious that there is such a remedy, it is the duty of the court to interpose the objection sua sponte". Singer Sewing Machine Company vs. Benedict, 229 U. S. 481, 484. See also Twist vs. Prairie Oil & Gas Co., 274 U. S. 684, 690; Matthews vs. Rodgers, supra. Where the objection is not presented by the defendant in limine it may be treated as waived, provided the existence of a legal [fol. 64] remedy is not obvious. In view of the fact that the answer in this case explicitly raises the objection, we do not think that the hope expressed by the defendant's counsel at the oral argument that this Court would find it possible to take jurisdiction was intended as a waiver or, even if so intended can be treated as such.

The laws of Pennsylvania do not extend to the taxpayer the remedy of paying the tax under protest and bringing

suit in the courts for its recovery—a procedure which, where *it* clearly available, has always been treated as affording a complete and adequate remedy at law. (Shelton vs. Platt, 139 U. S. 591; Singer Sewing Machine Company vs. Benedict, supra; The Henrietta Mills vs. Rutherford County, N. C. 281 U. S. 121; Matthews vs. Rodgers, supra; Stratton vs. St. Louis, etc., Ry. Company, 284 U. S. 530). But neither do they give to the State authorities the coercive measures of distraint and levy without a prior judicial determination of the legality and amount of the tax, if the taxpayer desires it and, therefore, he has a completer remedy than by suit to recover a tax paid.

Under the law of Pennsylvania, the first step for the assessment of a transfer inheritance tax upon the estate of a non-resident decedent is an appraisement of the property which it is proposed to tax by an agent of the Department of Revenue, of which appraisement notice must be given to all interested parties. The act then provides that, "Any person not satisfied with the appraisement * * * may appeal * * * to the court of common pleas of Dauphin County, on paying or giving security to pay all [fol. 65] costs together with whatever taxes shall be fixed by the court. Upon such appeal, the court may determine all questions of valuation, and the liability of the appraised estate for such tax, subject to the right of appeal to the Supreme or Superior Court". (Act of April 9, 1929, P. L. 343. Purd. Tit. 72. Sec. 1202.)

The procedure for the collection of the tax as finally determined, is also defined by the Act of April 9, 1929, above referred to. After the tax has remained due and unpaid for a year the Department of Justice acting on behalf of the Department of Revenue may apply to a court of Common Pleas "by bill or petition, to enforce payment of the same, whereupon the court, having caused notice to be given * * * shall proceed according to equity to make such decree or order for the payment of the tax out of such property, as shall be just and proper". Or, at its discretion, the Department of Justice may bring "in any court of the Commonwealth having jurisdiction, any appropriate suit at law or in equity, by action of assumpsit or otherwise, for any * * * taxes due the Commonwealth". Purdon, Tit. 72, Sec. 1406. In such suit or where the proce-

dure is by petition, the taxpayer may make the defense that the taxing statute is unconstitutional or that the tax was illegally assessed by reason of the non-taxable situs of the property or any other defense which he may have.

In Keokuk & Hamilton Bridge Company vs. Salm, 258 U. S. 122, the Supreme Court considered procedure provided by the statutes of Illinois, essentially the same as the [fol. 66] foregoing in all respects, and held that "The Law of Illinois affords ample opportunity to question the amount and validity of an assessment both before administrative tribunals and in its courts", and upheld a decree of the District Court dismissing the bill because of an adequate remedy at law. True, that was a case in which it was admitted that some tax was due, the basis of the complaint being discriminatory over-valuation, and the Supreme Court held that another ground for dismissing the bill was the failure of the taxpayer to have paid or tendered the amount of the taxes confessedly due. Nevertheless the decision rested upon both grounds and appears to be dispositive of the question of an adequate remedy at law in this case.

In general, injunctive relief will be denied against threatened action at law where the matters relied upon would be a complete defense to the action and where the plaintiff's right will be fully protected by a successful defense. 21 C. J. 68. A judgment in such action would be as complete and adequate a remedy as an injunction. Grand Chete vs. Winegar, 15 Wall. 373.

We are not unmindful of the rule of Smyth vs. Ames, 169 U. S. 466; Chicago, etc., Ry. Company vs. Osborne, 265 U. S. 14, and many other cases to the effect that the test of equity jurisdiction in a federal court is the inadequacy of the remedy on the law side of that court and not the inadequacy of the remedies afforded by the state courts (Risty vs. Chicago etc. Ry. Company, 270 U. S. 378) and, of course, a non-resident sued by the state of Pennsylvania for tax cannot remove the cause to the District Court upon the [fol. 67] ground of diversity of citizenship. (Nevada-California Power Company vs. Hamilton, 235 Fed. 317.) But he may raise the constitutionality of the statute or the rights asserted under it by way of defense, and, as was pointed out in Matthews vs. Rodgers, supra, "If the remedy

at law (given by the state law) is plain, adequate, and complete, the aggrieved party is left to that remedy in the state courts, from which the cause may be brought to this Court (the Supreme Court of the United States) for review if any federal question be involved. * * *"

We do not think that the remaining allegations of the bill—as to possible delay in the administration of the estate and the inconvenience of being compelled to keep enough money on hand to meet the tax if it should be found to be valid—set forth any irreparable injury. These are ordinary incidents in the administration of any estate in which disputed questions have to be litigated. There may conceivably be situations in which delay would cause irreparable injury to the estate, but no circumstances suggesting anything of the sort in this case are averred, and we must assume that the case is the ordinary one in which delay and the withholding of funds from distribution for a period of time is by no means unusual or particularly serious.

The conclusion is that the bill must be dismissed for want of equitable jurisdiction in this Court.

By the Court:

W. H. Kirkpatrick, J.

[fol. 68] In United States District Court for the Eastern District of Pennsylvania, September Term, 1932

In Equity. No. 7395

City Bank Farmers Trust Company, Executor under the Will of Thomas B. Clarke, Deceased,

vs.

The Honorable William A. Schnader, Attorney General of the Commonwealth of Pennsylvania, and the Honorable Leon D. Metzger, Secretary of Revenue of the Commonwealth of Pennsylvania

Final Decree—Filed April 11, 1933

And now, to-wit, April 11th, 1933, this cause came on to be heard at this term, and was argued by counsel, and upon consideration thereof, it is ordered, adjudged and decreed as follows:

I. The Bill of Complaint be, and is hereby dismissed for want of equitable jurisdiction and at the cost of the plaintiff.

By the court:

J. W. Thompson, Circuit Judge.

[fol. 69] In United States District Court

[Title omitted]

Petition for Appeal—Filed April 11, 1933

The above-named plaintiff, feeling aggrieved by the decree made and entered in the above entitled proceeding in equity on the 11th day of April, A. D. 1933, does hereby appeal from the said decree to the Supreme Court of the United States, for the reasons specified in the Assignments of Error filed herewith; and prays that this appeal may be allowed, and that a transcript of the record proceedings and papers, upon which the said decree was made, duly authenticated, may be sent to the Supreme Court of the United States under the rules of the said Court in such cases made and provided.

And your petitioner further prays that the proper order relating to the security to be required of it be made.

Dated April 11th, 1933.

Henry S. Drinker, Jr., Attorney for Plaintiff, 1429 Walnut Street, Philadelphia, Penna.

[fol. 70] In United States District Court

[Title omitted]

Order Allowing Appeal—Filed April 11, 1933

And now, to-wit, April 11th, 1933, the foregoing appeal to the Supreme Court of the United States is allowed upon the giving by the above-mentioned plaintiff of a bond, as required by the law, in the sum of Two hundred fifty dollars ($250.00).

J. W. Thompson, Circuit Judge.

[fol. 71] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed April 11, 1933

And now, to-wit, April 11th, 1933, comes the plaintiff in the above entitled proceeding in equity, appellant herein, and files the following Assignments of Error upon which it will rely in the prosecution of its appeal from the decree made by this Honorable Court on the 11th day of April, A. D. 1933 in the above entitled cause.

I

That the United States District Court for the Eastern District of Pennsylvania erred in denying the interlocutory injunction prayed for by the plaintiff.

II

That the United States District Court for the Eastern District of Pennsylvania erred in dismissing the Bill of Complaint for want of equitable jurisdiction.

III

That the United States District Court for the Eastern District of Pennsylvania erred in imposing the costs of the above entitled proceeding in equity upon the plaintiff.

[fol. 72] IV

That the United States District Court for the Eastern District of Pennsylvania erred in entering the following decree:

"And now, to-wit, April 11, 1933, this cause came on to be heard at this term, and was argued by counsel, and upon consideration thereof, it is ordered, adjudged and decreed as follows:

1. The Bill of Complaint be, and is hereby dismissed for want of equitable jurisdiction and at the cost of the plaintiff."

Wherefore the appellant prays that the aforesaid decree be reversed and that the case be remanded to the District

Court, of three Judges, for final hearing upon the merits, and that the United States District Court for the Eastern District of Pennsylvania be ordered and directed to grant such further relief and in such form as the Supreme Court of the United States shall deem just.

Henry S. Drinker, Jr., Attorney for Appellant, 1429 Walnut Street, Philadelphia, Penna.

[fol. 73] Bond on appeal for $250.00, approved and filed April 11, 1933, omitted in printing.

[fol. 74] Citation, in usual form, showing service on W. A. Schnader, filed April 28, 1933, omitted in printing.

[fol. 75] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRÆCIPE FOR RECORD—Filed May 8, 1933

To the Clerk:

Please incorporate the following portions of the record of said District Court into the transcript:

Docket entries.
Bill of Complaint.
"Exhibit A" (attached to Bill of Complaint).
Injunction Affidavit of Charles C. Jordon.
Injunction Affidavit of Fiske Kimball.
Motion for Interlocutory Injunction (restraining order).
Restraining order.
Bond on restraining order.
Answer.
Stipulation as to certain facts.
Opinion.
Final decree.
Petition for appeal and order allowing same.
Assignment of errors and Prayer for reversal.
Statement as to Jurisdiction of Appeal.
Notice as to Opposing Statement of Jurisdiction.
[fol. 76] Citation and Acceptance of Service thereof.
Proof of service of papers pursuant to Rule 12.

Bond on appeal.
Præcipe for record.
Clerk's certificate.

(S.) Henry S. Drinker, Jr., Attorney for Appellant.

[fol. 77] IN UNITED STATES DISTRICT COURT

[Title omitted]

PROOF OF SERVICE OF PRÆCIPE FOR RECORD—Filed May 8, 1933

Comes now the plaintiff in the above entitled cause and files its proof of service of the appellant's præcipe for record. Such proof of service is shown by the affidavit of Leslie M. Swope, an attorney for the plaintiff, and said affidavit is attached to and made a part of the said statement.

(S.) Henry S. Drinker, Jr., Attorney for Plaintiff,
1429 Walnut Street, Philadelphia, Penna.

[fol. 78] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF LESLIE M. SWOPE

COMMONWEALTH OF PENNSYLVANIA,
County of Philadelphia, ss:

Leslie M. Swope, zeing first duly sworn upon oath, deposes and says: That he is a citizen of the United States, and a resident of the County of Philadelphia and Commonwealth of Pennsylvania, over twenty-one years of age; that upon May 4, 1933, at Philadelphia, Pennsylvania, he mailed, by registered mail, a sealed envelope, with postage prepaid, addressed to William A. Schnader, Attorney General of the Commonwealth of Pennsylvania, Harrisburg, Pennsylvania, one of the appellees, and counsel for both appellees, in which was enclosed a true and correct copy of appellant's præcipe for record.

That on May 4, 1933, at Philadelphia, Pennsylvania, he mailed, by registered mail, a sealed envelope, with postage

prepaid, addressed to Leon D. Metzger, Secretary of Revenue of the Commonwealth of Pennsylvania, Harrisburg, Pennsylvania, in which was enclosed a true and correct copy of the same præcipe for record.

That your deponent duly received from the Post Office Department at Harrisburg, Pennsylvania, return receipts [fol. 79] signed by the addressees' agents showing delivery of the above described registered articles to the said William A. Schnader and Leon D. Metzger, on May 5, 1933.

Dated May 6, 1933.

(S.) Leslie M. Swope, of Counsel for Plaintiff, 1429 Walnut Street, Philadelphia, Penna.

Sworn to and subscribed before me this 6th day of May, A. D. 1933. My commission expires 3/2/37. (S.) W. A. Schrader, Notary Public. (Seal.)

[fol. 80] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 81] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed May 20, 1933

Comes now the appellant in the above entitled cause and states that the points upon which it intends to rely in this Court in this case are as follows:

I. That the United States District Court for the Eastern District of Pennsylvania erred in denying the interlocutory injunction prayed for by the plaintiff.

II. That the United States District Court for the Eastern District of Pennsylvania erred in dismissing the Bill of Complaint for want of equitable jurisdiction.

III. That the United States District Court for the Eastern District of Pennsylvania erred in imposing the costs of the above entitled proceeding in equity upon the plaintiff.

[fol. 82] IV. That the United States District Court for the Eastern District of Pennsylvania erred in entering the following decree:

"And now, to-wit, April 11th, 1933, this cause came on to be heard at this term, and was argued by counsel, and upon consideration thereof, it is ordered, adjudged and decreed as follows:

1. The Bill of Complaint be, and is hereby dismissed for want of equitable jurisdiction and at the cost of the plaintiff."

And the appellant further states that only the following parts of the record, as filed in this Court, need be printed by the Clerk for the hearing of the case:

Title of paper	Record page
Docket Entries	1
Bill of Complaint	3
"Exhibit A" (Attached to Bill of Complaint)	18
Injunction Affidavit of Charles C. Jordan	29
Injunction Affidavit of Fiske Kimball	37
Motion for Interlocutory Injunction (restraining order)	41
Restraining order	43
Bond on restraining order	46
Answer	48
Stipulation as to certain facts	59
Opinion	61
Final Decree	68
Petition for Appeal	69
Order Allowing Appeal	70
[fols. 83 & 84] Assignment of Errors and Prayer for Reversal	71
Bond sur appeal	73
Citation and Acceptance of Service thereof	74
Præcipe for Record	75
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Clerk's Certificate	80
Statement as to Jurisdiction of Appeal	82
Notice as to opposing Statement of Jurisdiction	87
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Henry S. Drinker, Jr., 1429 Walunt Street, Philadelphia, Penna., Attorney for Appellant.

[fol. 85] IN SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF PENNSYLVANIA,
County of Philadelphia, ss:

Henry S. Drinker, Jr., being first duly sworn upon oath, deposes and says: That he is a citizen of the United States, and a resident of the County of Philadelphia and Commonwealth of Pennsylvania, over twenty-one years of age; that upon May 18, 1933 at Philadelphia, Pennsylvania, he mailed, by registered mail, a sealed envelope, with postage prepaid, addressed to William A. Schnader, Attorney General of the Commonwealth of Pennsylvania, Harrisburg, Pennsylvania, one of the appellees, and counsel for both appellees, in which was enclosed a true and correct copy of appellant's Statement of Points to be Relied Upon and Designation of the Parts of the Record to be Printed.

That on May 18, 1933, at Philadelphia, Pennsylvania, he mailed by registered mail, a sealed envelope, with postage prepaid, addressed to Leon D. Metzger, Secretary of Revenue of the Commonwealth of Pennsylvania, Harrisburg, [fols. 86 & 87] Pennsylvania, in which was enclosed a true and correct copy of the same Statement of Points to be Relied Upon and Designation of the Parts of the Record to be Printed.

Dated May 18, 1933.

Henry S. Drinker, Jr., Attorney for Appellant, 1429 Walnut Street, Philadelphia, Penna.

Sworn to and subscribed before me this 18 day of May, A. D. 1933. My commission expires 3/2/37. W. A. Schrader, Notary Public. (Seal of W. A. Schrader, Notary Public, Phila., Pa.)

[fol. 88] [File endorsement omitted.]

Endorsed on cover: File No. 37,686. E. Pennsylvania D. C. U. S. Term No. 84. City Bank Farmers Trust Company, executor under the will of Thomas B. Clarke, deceased, appellant, vs. William A. Schnader, Attorney General of the Commonwealth of Pennsylvania, and Leon D. Metzger, Secretary of Revenue of the Commonwealth of Pennsylvania. Filed May 20, 1933. No. 84, O. T., 1933.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 989

CITY BANK FARMERS TRUST COMPANY, EXECUTOR UNDER THE WILL OF THOMAS B. CLARKE, DECEASED, APPELLANT,

vs.

WILLIAM A. SCHNADER, ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA, AND LEON D. METZGER, SECRETARY OF REVENUE OF THE COMMONWEALTH OF PENNSYLVANIA.

STATEMENT AS TO JURISDICTION OF APPEAL.

MAY IT PLEASE THE COURT:

The appellant, in support of the jurisdiction of the Supreme Court of the United States to review the above entitled cause on appeal, respectfully represents:

A.

Statutory Provisions Sustaining Jurisdiction.

The Act of February 13, 1925, Chapter 229, Sec. 1, 43 Stat. 936, 938 (U. S. Code, Title 28, Sec. 380), pro-

vides that Section 266 of the Judicial Code is amended to read in part as follows:

> "An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case." (Such case being an application for an "interlocutory injunction suspending or restraining the enforcement, operation or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute" etc.)

B.

Statute of the State the Validity of Which is Involved.

"SECTION 1 of the Act of June 20, 1919, P. L. 521, 72 P. S. 2301, as last amended by the Act of June 22, 1931, P. L. 690, of the State of Pennsylvania, provides in part as follows:

" 'SECTION 1. *Be it enacted, &c.,* That a tax shall be, and is hereby, imposed upon the transfer of any property, real or personal, or of any interest therein or income therefrom in trust or otherwise, to persons or corporations in the following cases:

* * * * * * *

" '(*b*) When the transfer is by will or intestate laws of real property within this Commonwealth, or of goods, wares, or merchandise within this Commonwealth, or of shares of stock of corporations of this Commonwealth or of national banking associations located in this Commonwealth, and the decedent was a non-

resident of the Commonwealth at the time of his death.' "

C.

Date of Decree and Date of Application for Appeal.

The decree sought to be reviewed was entered on the 11th day of April, 1933.

The application for appeal was presented on the 11th day of April, 1933.

D.

Nature of Case and Ruling Below.

A New York resident, having *temporarily* made an accommodation loan of a collection of rare paintings to a Pennsylvania museum for free exhibition to the public, and having died while the pictures were there on exhibition, the Secretary of Revenue and the Attorney General of Pennsylvania are proceeding to appraise, assess, and collect an inheritance tax thereon under the alleged authority of the Pennsylvania Inheritance Tax statute. The executor, a New York Trust Company, applied for an interlocutory injunction on the ground that the Pennsylvania statute, if it imposes such a tax, is unconstitutional, and if it does not, the acts of defendants are unconstitutional. The questions thus presented to the district court were:

I. Did that court have jurisdiction; and was a three-judge court required under section 266 of the Judicial Code?

II. Did plaintiff make out a case of unconstitutionality sufficient to support an interlocutory and final injunction?

III. If so, was plaintiff entitled to equitable relief on the facts?

The ruling of the District Court, of three judges, was that the plaintiff had an adequate remedy at law and, therefore, that the appeal should be dismissed for want of equitable jurisdiction.

Plaintiff represents that it does not have an adequate remedy at law and, therefore, that the specially constituted District Court abused its discretion in denying the interlocutory injunction because:

1. The laws of Pennsylvania do not extend to the taxpayer the remedy of paying the tax under protest and bringing suit in the court for its recovery (Opinion of lower court in case at bar, paragraph 8).

2. The only clear way to test the validity of the tax, under the law of Pennsylvania, and this was regarded as an adequate remedy at law by the lower court, is to take an appeal from the administrative appraisers to the Dauphin County Court upon posting a bond to cover the full amount of the tax. This remedy is not available on the law side of the Federal courts and, since it denies to the plaintiff, a non-resident of Pennsylvania, its constitutional right to a trial in the Federal courts, is not an adequate remedy at law. *Smyth* v. *Ames*, 169 U. S. 466, 516; *Chicago, B. & Q. R. R.* v. *Osborne*, 265 U. S. 14, 16; *Risty* v. *Chicago, R. I. & Pac. Ry. Co.*, 270 U. S. 378, 388. Moreover, the cost of the

bond required is substantial, amounting in this case to at least $1,000 a year, and cannot be recovered by the plaintiff even if successful in its appeal. This is analagous to cases where it was held that a suit to recover is an inadequate remedy at law where no interest can be recovered in the suit. *Hopkins* v. *Southern Cal. Tel. Co.*, 275 U. S. 393, 399; *Nutt* v. *Ellerbe*, 56 *Fed.* (2d) 1058, 1063; *Southern Railway Co.* v. *Query*, 21 Fed. (2d) 333, 342.

3. The District Court also relied upon new and unconstrued legislation of 1929 whereby, after assessment, the State could sue in its court for collection of the tax, stating that the right to defend in such suit is an adequate remedy at law. Assuming that the assessment could be collaterally attacked at such a late date, which is doubtful, the lower court admitted in its opinion (paragraph 13) that the case could not be removed to the Federal courts on the ground of diversity of citizenship. This renders the remedy at law inadequate. *Nevada-California Power Co.* v. *Hamilton*, 235 Fed. 317; affirmed (C. C. A. 9th); *Franklin* v. *Nevada-California Power Co.*, 264 Fed. 643, 645.

4. The tax when assessed becomes a lien upon the property taxed and the removal of this cloud on title is sufficient grounds for equitable jurisdiction. *Fisher* v. *Brucker*, 41 Fed. (2d) 774; *Greene* v. *Louisville, etc., R. R. Co.*, 244 U. S. 499; *Risty* v. *Chicago, R. I. & Pac. Co.*, 270 U. S. 378, 388.

5. Time is of the essence of the remedy in this case because delays by litigation in the state courts will

cause the estate to forfeit its rights to the 80 per cent credit on its Federal estate tax under the statute of limitations there provided; and such delays are, moreover, hindering the proper administration of the estate in the City of New York, to the irreparable injury of the beneficiaries. The taxing officials of Pennsylvania delayed action in this case for eighteen months prior to the filing of the bill of complaint and there is no statute of limitations on assessments in Pennsylvania which would ever require action by the State officials, which is a prerequisite to the appeal by the plaintiff to the Dauphin County Court and to the defense in a suit by the State against the executor.

6. The court below apparently confused the question as to what constitutes an adequate remedy under the Due Process Clause (where a remedy confined to the *State courts* is adequate) with the question as to the adequacy of a remedy at law to prevent Federal equity jurisdiction, where the remedy must be available in the *Federal courts*. In addition to this error, the lower court erroneously disregarded the necessity for the bond in the State court, the presence of the cloud on plaintiff's title, and the possible loss of the right to the 80 per cent credit.

E.

Cases Believed to Sustain Jurisdiction.

The following decisions of the Supreme Court of the United States are believed to sustain jurisdiction of this appeal:

Chicago, B. & Q. R. R. Co. v. *Osborne,* 265 U. S. 14, 16.

Stewart Dry Goods Co. v. *Lewis*, 53 Sup. Ct. 66.
Louis K. Liggett Company v. *Baldrige*, 278 U. S. 105.
Chicago G. W. Rwy. v. *Kendall*, 266 U. S. 94, 97.

We respectfully submit that this Court has jurisdiction of this appeal by virtue of Section 266 of the Judicial Code, as amended by the act of February 13, 1925.

Respectfully submitted,

HENRY S. DRINKER, JR.,
Attorney for Appellant,
1429 *Walnut Street,*
Philadelphia, Pa.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933. No. 84.

City Bank Farmers Trust Company, Executor under the Will of Thomas B. Clarke, deceased, Appellant,

v.

William A. Schnader, Attorney General of the Commonwealth of Pennsylvania, and Leon D. Metzger, Secretary of Revenue of the Commonwealth of Pennsylvania.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA, SEPT. TERM, 1932, No. 7395, UNREPORTED OPINION MARCH 24, 1933 (R. 41).

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

The facts in this case are not in dispute. The hearing before the three-judge Court below was on the averments of the Bill (R. 2-11), all of which were admitted by the Answer, supplemented by certain additional facts set out in the Answer (R. 34-40) and in a Stipulation (R. 40-41). The essential facts are as follows:

In March, 1928, Thomas B. Clarke, a citizen and resident of New York City, then in his 80th year, at the request of his intimate friend Dr. Fiske Kimball, Director of the Pennsylvania Museum, loaned to the Museum, for exhibition at the formal opening of the newly constructed Museum building on the Phila-

delphia Parkway, his unique collection of early American portraits.

The arrangement between Clarke and Kimball was wholly oral. No consideration was paid or intended to be paid to Clarke for the loan. The term contemplated was about six months, but it was understood that the pictures would be returned to Clarke at any time on his request.

On several occasions subsequent to the date of the original loan in March, 1928, Clarke suggested the return of the paintings, but under pressure from Kimball to extend his loan because of the great appreciation shown by the public, Clarke orally consented from time to time to leave the paintings temporarily at the Museum and thus when Clarke died on January 18, 1931, they were there on display, returnable on demand.

The 164 paintings comprising the loan had been collected by Clarke over a period of twenty or thirty years. 85 of them were owned by a New York corporation, The Art House, Inc., of which Clarke was the sole stockholder. Of the remaining 79 owned by Clarke personally, 5 were at the time of the loan in his New York residence, 10 were on exhibition at the Century Club in New York, and the balance, 64, were in storage in New York City. All of the 79 owned by Clarke personally, which at the time of the loan had an unquestioned situs in New York City, had from time to time been exhibited there, in each case with selected groups of the 85 belonging to The Art House, Inc., but not as a unit or in connection with the entire 85.

In the spring of 1929, after the pictures had been at the Museum for about a year, Clarke, at Kimball's solicitation, wrote Kimball that if Kimball could secure a donor who would present the entire collection of 164 paintings to the Museum, Clarke would sell them as a whole to such donor at a stated price, it being then understood that Clarke would allow them to remain at the Museum for such reasonable time as Kimball might require to secure such donor. Subsequently, on May 21, 1930, Clarke again wrote Kimball stating that the above arrangement would terminate on June 17, 1930. From the latter date, at Kimball's solicitation, the pictures were permitted by Clarke to remain at the Museum until his death on January 18, 1931, but with the understanding that they would be returned to

Clarke in New York at any time on his request. During this time, Mr. Clarke, although not obligated to sell or otherwise to dispose of them, was willing (as the Answer avers) to sell to any purchaser who would buy the collection as a whole for presentation to the Pennsylvania Museum or to a substantially similar institution. While the paintings thus remained at the Museum, Clarke made no definite plans or request for their return or removal to any other place, except that on April 29, 1929, four of them were sent at his request to the Virginia Historical Society, for an exhibition at Richmond, which four were returned to the Philadelphia Museum on May 25, 1929.

The Museum is a non-profit corporation partially supported by the City of Philadelphia and the Commonwealth of Pennsylvania and has secured a substantial portion of the works of art therein displayed to the public by voluntary loans from non-resident philanthropists. It is customary for public museums to secure exhibitions in this manner, and the period for which the Clarke collection was held by the Museum prior to his death was shorter than the usual period of such loans.

Following Mr. Clarke's death, plaintiff, as executor of his estate, disclosed the facts to the defendants, directly or through their subordinates, and applied for a waiver of inheritance taxes on the ground that the pictures were only temporarily in Pennsylvania at the time of death and therefore were not subject to inheritance taxation by the Commonwealth.

Plaintiff was notified that an official appraisement of the Pennsylvania assets belonging to the estate of Thomas B. Clarke would be held in the Office of the Secretary of Revenue on April 20, 1931. Plaintiff appeared at said hearing through its attorneys and protested the appraisement of the property for taxation on the ground that the taxable situs thereof was in the State of New York and filed under protest an "Application for Appraisement and Waiver of Transfer Inheritance Tax Provisions" on the face of which it asserted that the deceased left no property in Pennsylvania subject to taxation. At the hearing the Commonwealth's appraiser, who was an employee in the Department of Revenue, referred the question of tax liability to the defendant, William A. Schnader. Pending the latter's decision he postponed the hearing from time to time to a

future undetermined day to be held after notice to the parties. To date the hearing has not been held.

Meantime, plaintiff as Executor of the Estate of Thomas B. Clarke, deceased, had taken up the question of tax liability with the proper officials of New York State and was advised in a letter dated July 11, 1932, from the New York State Tax Commission that the said collection of 79 paintings was subject to the New York estate tax and that an extension of time to pay said tax pending the determination of the legal question involved in Pennsylvania would not be allowed. Pursuant to the demand made in said letter and in order to avoid the severe penalties imposed by the New York statute for non-payment within a year and a half of decedent's death, plaintiff paid, under protest, to the State of New York on July 15, 1932, an estate tax amounting to $69,500. on the basis of a return which included therein the aforesaid collection of 79 paintings at the said value thereof in the amount of $714,500. The New York law provides a procedure for refund of inheritance taxes improperly paid, but this procedure does not provide for a refund of interest on the tax.

The above facts were alleged in the bill and answer in the case at bar.

The answer further alleged that "under the facts set forth in the Bill of Complaint and in this Answer, these 79 portraits had an actual situs in Pennsylvania" and were subject to inheritance tax in Pennsylvania and not in New York, obviously a conclusion of law. The only denial contained in the answer is in paragraph 26, as follows:

> "26. Defendants deny that the plaintiff has no adequate remedy at law. On the contrary, defendants aver that the plaintiff has a full, adequate and complete remedy at law duly provided by the statutes of the Commonwealth of Pennsylvania permitting the plaintiff to appeal to the Court of Common Pleas of Dauphin County from any assessment made against it by the defendants."

The answer also averred that the suit, being against defendants in their capacities as Attorney General and Secretary of Revenue of Pennsylvania, was against the Commonwealth

of Pennsylvania, contrary to the Eleventh Amendment, whereby the Court was without jurisdiction to entertain plaintiff's suit.

Plaintiff, a citizen and resident of New York, as Executor of a New York decedent, thus invokes the aid of a Federal Court of Equity to prevent defendants, both citizens of Pennsylvania, from enforcing a Pennsylvania statute to tax property of plaintiff not within the jurisdiction of Pennsylvania. Federal jurisdiction is based primarily on diverse citizenship, although the violation of a right guaranteed by the Federal Constitution is also presented.

Federal equity jurisdiction is invoked, *first,* because essential to protect property rights against injury, otherwise irremediable, resulting from the threatened enforcement of a State law contravening the Federal Constitution, the available remedies being confined to the State Courts; *second,* to remove the cloud on plaintiff's title to the paintings, created by the lien which the Pennsylvania inheritance tax law purports to impose on them, which obviously precludes plaintiff from selling the paintings as required by the will and entails serious and unwarranted expense in the administration of the estate; *third,* because under the available procedure in the Pennsylvania Courts, plaintiff is powerless to force the determination of the issue, but must await action by defendants, which has already been delayed for almost three years; *fourth,* because, even when pursued by defendants, the available Pennsylvania procedure provides an inadequate remedy, in that it will subject plaintiff to serious expense for a bond without possibility of reimbursement, and by reason of the probable delay will subject plaintiff to serious risk of losing the eighty per cent. credit on the Federal inheritance tax.

The present procedure is obviously both the orderly and fair way of determining, once and for all, whether under the admitted facts these paintings are subject to inheritance tax by New York or by Pennsylvania. The New York authorities have intervened and filed a brief. Both they and defendants expressed to the lower Court their desire to have the question thus determined. In spite of this, however, the Court below dismissed the bill on the ground that the right of plaintiff to appeal to the Dauphin County Court from the

assessment of the tax, or the right to defend a suit therefor by the Commonwealth of Pennsylvania, constituted an adequate remedy at law, which precluded the jurisdiction of the Federal Court. In so holding, the Court apparently overlooked the fact that neither of the remedies suggested is available in the Federal Court, and apparently confused the question as to what constitutes an adequate remedy under the Due Process Clause, (under which a remedy confined to the State Courts is adequate), with the question as to what constitutes an adequate remedy at law sufficient to preclude Federal Equity jurisdiction (in which case the remedy must be available in the Federal Courts).

The Court also disregarded the presence of the cloud on plaintiff's title, the irreparable loss to plaintiff incident to the expense of the bond, and the delay in the administration of the estate and the possible loss of the eighty per cent. credit on the Federal tax.

SPECIFICATION OF ERRORS.

I. The United States District Court for the Eastern District of Pennsylvania erred in denying the interlocutory injunction prayed for by the plaintiff.

II. The United States District Court for the Eastern District of Pennsylvania erred in dismissing the Bill of Complaint for want of equitable jurisdiction.

III. The United States District Court for the Eastern District of Pennsylvania erred in imposing the costs of the above entitled proceeding in equity upon the plaintiff.

IV. The United States District Court for the Eastern District of Pennsylvania erred in entering the following decree:

> "AND NOW, to-wit, April 11th, 1933, this cause came on to be heard at this term, and was argued by counsel, and upon consideration thereof, it is ordered, adjudged and decreed as follows:
>
> "I. The Bill of Complaint be, and is hereby dismissed for want of equitable jurisdiction and at the cost of the plaintiff."

SUMMARY OF ARGUMENT.

I. THE COURT BELOW ERRED IN DISMISSING THE SUIT FOR WANT OF FEDERAL EQUITY JURISDICTION.

1. Federal Equity Jurisdiction will be exercised to enjoin the threatened enforcement of a State law which contravenes the Federal Constitution, when essential, as here, effectually to protect rights against injury otherwise irremediable.

Unless enjoined, the State authorities will impose on the New York property of appellant a Pennsylvania inheritance tax, subjecting appellant to an injury for which no other remedy in the Federal Courts is available.

The existing legal remedies, relied on by the Court below, are available only in the State Courts.

A State cannot thus tie up a citizen of another State, having property rights within its territory invaded by unauthorized acts of its own officers, to suits in its own Courts.

Whenever a citizen of a State can go into the Courts of a State to defend his property against the illegal acts of its officers, a citizen of another State may invoke the jurisdiction of the Federal Courts to maintain a like defense.

2. Equity jurisdiction is also necessary to remove the cloud on appellant's title to the paintings, resulting from the threatened tax lien thereon under the Pennsylvania inheritance tax.

The jurisdiction of the Federal Equity Courts to remove liens, incumbrances and clouds on the title to personal property is expressly recognized by Section 8 of the Act of March 3, 1875, incorporated in Section 57 of the Judicial Code, and by the decisions of this Court.

3. The available remedies at law in the State Courts are inadequate in that they are wholly in the control of the adverse party, subjecting the taxpayer to expensive and irreparable delay, to the unredressable expense of a bond in double the amount of the tax, and to the grave risk of losing the eighty per cent credit on the Federal inheritance tax.

II. THE COURT BELOW ERRED IN NOT SUSTAINING THE PRAYERS OF THE BILL.

It is hoped that the Court will exercise its discretion to make final disposition of the case on the merits at this time, thus assuring appellant the expedited adjudication which Congress, by Section 266 of the Judicial Code, contemplated for this important class of cases.

The transmission from the dead to the living of a particular thing is an event which can take place in and be made the basis of inheritance taxation by but one State.

The paintings collected, kept and used by Clarke at his New York domicile for many years, could lose their New York situs only by their removal from New York with the intention of placing and keeping them permanently in a new situs.

The temporary loan of the paintings to the Pennsylvania Museum did not thereby give them a permanent Pennsylvania situs, sufficient to sustain the imposition of a Pennsylvania inheritance tax by reason of the New York owner's death prior to their return to New York; and the executor properly paid the inheritance tax thereon to New York.

While the presence of the pictures in Pennsylvania might conceivably have subjected them to a reasonable local property tax, on an annual basis, consistent with the expense of their temporary protection under Pennsylvania law, there existed no "real taxable relationship" on the part of Pennsylvania to the event of the passage of title thereto from a New York decedent sufficient to justify an inheritance tax on Clarke's death before the return of the paintings to their New York domicile.

ARGUMENT.

I. The Court Below Erred in Dismissing the Suit for Want of Federal Equity Jurisdiction.

1. FEDERAL EQUITY JURISDICTION WILL BE EXERCISED TO ENJOIN THE THREATENED ENFORCEMENT OF A STATE LAW WHICH CONTRAVENES THE FEDERAL CONSTITUTION, WHEN ESSENTIAL, AS HERE, EFFECTUALLY TO PROTECT PROPERTY RIGHTS AGAINST INJURY OTHERWISE IRREMEDIABLE.

In the case at bar, admittedly the State officials have threatened to impose the Pennsylvania inheritance tax of approximately $50,000 on these 79 paintings, admittedly valued at $714,500.

> "Equity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravenes the Federal Constitution wherever it is essential in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable; and in such a case a person, who as an officer of the State is clothed with the duty of enforcing its laws and who threatens and is about to commence proceedings, either civil or criminal, to enforce such a law against parties affected, may be enjoined from such action by a federal court of equity. *Cavanaugh* v. *Looney*, 248 U. S. 453, 456; *Truax* v. *Raich*, 239 U. S. 33, 37, 38. See also *Ex parte Young*, 209 U. S. 123, 155, 162; *Adams* v. *Tanner*, 244 U. S. 590, 592; *Greene* v. *Louisville & Interurban R. R. Co.*, id. 499, 506; *Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U. S. 278, 293; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 621; *Western Union Telegraph Co.* v. *Andrews*, 216 U. S. 165; *Dobbins* v. *Los Angeles*, 195 U. S. 223, 241; *Davis & Farnum Manufacturing Co.* v. *Los Angeles*, 189 U. S. 207, 217."
>
> *Terrace* v. *Thompson*, *263 U. S. 197, 214.*

Appellant, the New York Executor of a New York decedent, has a constitutional right to have determined by the Federal Court its controversy with the Pennsylvania State officials as to whether Pennsylvania may constitutionally impose such tax.

As stated by the Court below in its opinion (R. 43):

> "The laws of Pennsylvania do not extend to the taxpayer the remedy of paying the tax under protest and bringing suit in the courts for its recovery."

The only clear way to test the validity of the tax under the state statutes (and this was regarded as an adequate remedy at law by the lower Court), is to take an appeal from the administrative appraisers to the Dauphin County Court upon posting a bond to cover the full amount of the tax. From the decision of the Dauphin County Court an appeal is allowed to the Supreme or Superior Court of Pennsylvania, depending upon the amount involved (Act of April 9, 1929, P. L. 343, 72 P. S., Sec. 1202). This legal remedy is obviously not available to plaintiff in the Federal Court by virtue of his diverse citizenship, as would be the right to pay the tax under protest and sue for its recovery.

The other remedy at law relied on by the lower Court (though not set up in the answer of the Attorney General of Pennsylvania) is the defense of a suit which might be brought by the Commonwealth of Pennsylvania in its own courts for the amount of the tax. Aside from the fact that the institution of such a suit would be wholly within the control of the State, and of the doubt as to whether the taxpayer would have the right to attack the legality of the assessment thus collaterally, certainly the taxpayer would be powerless to remove the case to the Federal Court, the State of Pennsylvania not being a citizen within the Removal Acts.

This Court has repeatedly held, however, that in a controversy between citizens of different states, involving an amount sufficient to sustain Federal jurisdiction, the foreign litigant cannot be deprived of his day in the Federal Court because of remedies at law provided by the State Law that are confined to the State Courts. In such cases the jurisdiction of the Federal Equity Court has been sustained in protection of the inherent and fundamental right of the citizen of the other State to have the controversy passed on by the Federal Court.

Reagan v. *Farmers Loan & Trust Co., 154 U. S. 362, 391;*

Smyth v. *Ames, 169 U. S. 466, 515-517;*

Terral v. *Burke Constr. Co., 257 U. S. 529, 532;*
Chicago B. & Q. R. R. Co. v. *Osborne, 265 U. S. 14, 16;*
Risty v. *Chicago R. I. & Pac. Ry. Co., 270 U. S. 378, 388.*

In the Reagan case, where a Federal Court in equity was held to have jurisdiction to restrain the enforcement of an order of the Texas Railroad Commission at the instance of a citizen of another state, notwithstanding the objection that plaintiff had an adequate remedy at law in the Courts of Texas, this Court laid down the general rule in the following language:

> "Nor can it be said in such a case that relief is obtainable only in the courts of the State. For it may be laid down as a general proposition that, whenever a citizen of a State can go into the courts of a State to defend his property against the illegal acts of its officers, a citizen of another State may invoke the jurisdiction of the Federal courts to maintain a like defence. A State cannot tie up a citizen of another State, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of the State to protect property rights, a citizen of another State may invoke the jurisdiction of the Federal Courts. *Cowles* v. *Mercer County, 7 Wall. 118; Lincoln County* v. *Luning, 133 U. S. 529; Chicot County* v. *Sherwood, 148 U. S. 529.*"

In *Terral* v. *Burke Construction Co., 257 U. S. 529; 532,* this Court, in sustaining the jurisdiction of the Federal Court of Equity to enjoin actions by State officials in depriving plaintiff of a right to sue in the Federal Courts, thus stated the grounds on which the above rule is based:

> "The principle established by the more recent decisions of this court is that a State may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the State, exact from it a waiver of the exercise of its constitutional right to resort to the federal

courts, or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not. The principle does not depend for its application on the character of the business the corporation does, whether state or interstate, although that has been suggested as a distinction in some cases. It rests on the ground that the Federal Constitution confers upon citizens of one State the right to resort to federal courts in another, that state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured is void because the sovereign power of a State in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the supreme fundamental law. * * * The appellant in proposing to comply with the statute in question and revoke the license was about to violate the constitutional right of the appellee. In enjoining him the District Court was right, and its decree is

Affirmed."

In *Chicago B. & Q. R. R. Co.* v. *Osborne, 265 U. S. 14, 16,* this Court further stated the distinction as follows:

"If an action to recover the payment were allowed, the suit might be brought in the Courts of the United States, under the usual conditions, as well as in those of the State. *Singer Sewing Machine Co.* v. *Benedict, 229 U. S. 481, 486.* But the writ of error of course can be sued out only in the State, and a remedy in the State Courts only has been held not to be enough. *Smyth* v. *Ames, 169 U. S. 466, 516. St. Louis-San Francisco Ry. Co.* v. *McElvain, 253 Fed. 123, 136. Franklin* v. *Nevada-California Power Co., 264 Fed. 643, 645.*"

Risty v. *Chicago, R. I. & Pac. Ry. Co., 270 U. S. 378, 388,* involved suits by citizens of states other than South Dakota to enjoin the County Commissioners, the Auditor and the Treasurer of Minnehaha County of South Dakota, from making any apportionment of benefits or assessments of costs affecting the property of the several plaintiffs for the construction or repair of a certain drainage system. In all of the suits, except one, there was diversity of citizenship. In

each it was alleged that the proceedings purporting to be had under the state statute were unauthorized and void and denied to plaintiffs due process of law and the equal protection of the laws, in contravention of the Constitution of the United States. It was argued by defendants that an adequate remedy was allowed under the State statutes. This Court summed up the situation as to all the suits except the one not involving diversity of citizenship in the following language (p. 388):

> "The remedy by appeal to the state court under § 8469 does not appear to be coextensive with the relief which equity may give. In any event, it is not one which may be availed of at law in the federal courts, and the test of equity jurisdiction in a federal court is the inadequacy of the remedy on the law side of that court and not the inadequacy of the remedies afforded by the state courts. *Smyth* v. *Ames, 169 U. S. 466; Chicago B. & Q. R. R. Co.* v. *Osborne, supra.*"

The Court below relies for its decision on *Matthews* v. *Rodgers, 284 U. S. 521,* and *Keokuk & Hamilton Bridge Co.* v. *Salm, 258 U. S. 122,* neither of which was a case involving diverse citizenship. In the first case, Federal jurisdiction was sought to be based on the allegation that the operation of the State law in question effected an interference with interstate commerce; in the second, that there was a denial of due process under the Fourteenth Amendment. The Court below thus apparently confused the question as to what constitutes an adequate remedy under the due process clause (where a remedy confined to the State Courts is obviously adequate) with the question as to what constitutes such an adequate remedy at law as to preclude Federal equity jurisdiction (where the remedy must be available in the Federal Courts).

The misapprehension by the lower Court of the basis of the decision in *Matthews* v. *Rodgers* is emphasized by the fact that in its quotation (R. 45-46) from the opinion of this Court (p. 526), the Court below omits the concluding phrase of the sentence, here inserted in italics (matter in brackets supplied by Court below):

> "If the remedy at law (given by the state law) is plain, adequate, and complete, the aggrieved party is left

> to that remedy in the state courts, from which the cause may be brought to this Court (the Supreme Court of the United States) for review if any federal question be involved, *Jud. Code § 237, or to his suit at law in the federal courts if the essential elements of federal jurisdiction are present.*"

The decisions cited by this Court in *Matthews* v. *Rodgers,* such as *Henrietta Mills* v. *Rutherford County, 281 U. S. 121, Singer Sewing Machine Co.* v. *Benedict, 229 U. S. 481,* and *Atchison, Topeka & Santa Fe Ry.* v. *O'Connor, 223 U. S. 280,* show upon examination that wherever diversity of citizenship existed, the right to sue at law for a refund was held to be an adequate remedy, in each case, because this remedy was available to the taxpayer on the law side of the Federal Court. Thus, in the *Henrietta Mills* case "there would have been an adequate remedy at law, not only in the state court, but also in the Federal court" (p. 127). In the *Singer Sewing Machine Company* case this Court, in speaking of the Colorado statute which gave to the taxpayer a right to recover back from a county, in a law suit, the illegal taxes collected, said: "This right was one which could be enforced by an action at law in the Circuit Court, no less than in the state courts, if the elements of Federal jurisdiction, such as diverse citizenship and the requisite amount in controversy, were present" (229 U. S. at p. 486).

The Court below further shows its oversight of the distinction in question by referring to *Nevada-California Power Co.* v. *Hamilton, 235 Fed. 317 (affirmed 264 Fed. 643)* in connection with the statement by the Court below that "of course, a non-resident sued by the state of Pennsylvania for tax cannot remove the cause to the District Court upon the ground of diversity of citizenship" (Rec. 45). But this is the very heart of the matter. It is the very reason why the Nevada Court assumed jurisdiction, saying:

> "If the Power Company be remitted to its defense in a tax suit, under sections 3657 to 3664 of the Revised Laws of Nevada, the actions must be brought in the name of the state, and in the counties where

the assessments are made. Section 3659. Such an action could not be removed to a federal court on the ground of diverse citizenship, because the state is not a citizen. Stone *v.* South Carolina, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. Ed. 962; Title Guaranty, etc., Co. *v.* State of Idaho, 240 U. S. 136, 36 Sup. Ct. 345, 60 L. Ed. 566" (p. 337).

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"Consequently, if the Nevada-California Power Company be denied a hearing because relief is afforded in a tax suit in a state court, it will be deprived of the right to have its cause tried in a federal tribunal, notwithstanding the fact that the essential elements of federal jurisdiction, such as diverse citizenship and requisite amount in controversy, as well as an alleged constitutional right violated, are present" (p. 338).

A very enlightening statement of the basis for the foregoing rule is that of Judge McPherson of the Third Circuit in the case of Borden's Condensed Milk Co. *v.* Baker, 177 Fed. 906, 910-11:

"As it seems to us, certain language in some of the cases has been misunderstood, and it may therefore be as well to state briefly what we understand to be meant by the adequate remedy at law that will prevent a federal court of equity from taking jurisdiction. Such a court has an equitable jurisdiction (unless changed by Congress) similar in extent to the jurisdiction that belonged to the English chancery in 1789. Among the cases in which the chancery exercised jurisdiction were certain controversies for which no adequate remedy existed in the English courts of law. The chancery did not inquire whether the complainant could obtain redress in a foreign court, but whether an English court of law could fully deal with the situation. So a federal court of equity, following the chancery precedents, does not inquire about the remedies available in a state court (which for this purpose is a foreign tribunal), but whether a federal court of law offers an adequate remedy; and this inquiry is confined to the remedies in the federal courts, no matter how ancient may be the remedies offered by the state."

2. EQUITY JURISDICTION MAY ALSO BE BASED ON THE REMOVAL OF THE CLOUD ON PLAINTIFF'S TITLE TO THE SEVENTY-NINE PAINTINGS, CAUSED BY THE ALLEGED LIEN OF THE PENNSYLVANIA TAX.

Apart from the fundamental necessity for Federal Equity jurisdiction to insure a New York citizen his day in the Federal Court to have determined a controversy with citizens of Pennsylvania involving the requisite amount, equity jurisdiction is amply sustained by the necessity for the intervention of the Equity Court to remove the cloud on plaintiff's title resulting from the claimed imposition of the Pennsylvania inheritance tax which the Pennsylvania law provides shall constitute a lien on the property until paid or satisfied.

It is well settled that equity has jurisdiction in this type of case to enjoin unlawful tax proceedings which cloud the plaintiff's title.

Greene v. *Louisville & Interurban R. R. Co., 244 U. S. 499;*

Risty v. *Chicago R. I. & Pac. Ry. Co., 270 U. S. 378.*

The lower Court distinguished these cases on the ground that they involved real estate and stated that no decision had been called to their attention "in which a possible lien upon a specific article or articles of personal property has been held to constitute a cloud upon title which will warrant injunctive relief" (Rec. 42). There are, however, many authorities upholding the jurisdiction of equity to remove a cloud upon personal property, to which counsel for plaintiff would gladly have called the Court's attention if the question of equity jurisdiction had been argued by the Attorney General or questioned at the argument in the Court below.

5 Pomeroy's Equity Jurisprudence (2 Ed.) Sec. 2151;

Jellenik v. *Huron Copper Mining Co., 177 U. S. 1;*

Thompson v. *Emmett Irr. Dist. (C. C. A. 9) 227 Fed. 560, 564;*

Fisher v. *Brucker (D. C. E. D. Mich.), 41 F. (2d) 774.*

In *Jellenik* v. *Huron Copper Mining Co., 177 U. S. 1,* this Court sustained the jurisdiction of the Federal Court of Equity to entertain a bill to remove a cloud on the title to shares of stock.

In *Thompson* v. *Emmett Irr. Dist., 227 Fed. 560,* the Court said (p. 564):

> "For the present purposes the allegations of the bill must be taken as true. They state a case for the removal of a cloud upon the title to personal property. It has been held that such a case is within the jurisdiction of a court of equity. 6 Pomeroy's Equity Jurisprudence, § 729; Sherman *v.* Fitch, 98 Mass. 59; Voss *v.* Murray, 50 Ohio St. 19, 32 N. E. 1112; Rosenbaum *v.* Foss, 4 S. D. 184, 56 N. W. 114; Stebbins *v.* Perry County, 167 Ill. 567, 47 N. E. 1048; Earle *v.* Maxwell, 86 S. C. 1, 67 S. E. 962, 138 Am. St. Rep. 1012; Magnuson *v.* Clithero, 101 Wis. 551, 77 N. W. 882; New York & New Haven Ry. Co. *v.* Schuyler, 17 N. Y. 592.
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> *"This jurisdiction is recognized as existing in a federal court of equity by section 8 of the act of March 3, 1875 (18 Stats. 472), incorporated into section 57 of the Judicial Code.* Jellenik *v.* Huron Copper Min. Co., 177 U. S. 1, 20 Sup. Ct. 559, 44 L. Ed. 647; Louisville & Nashville Ry. Co. *v.* Western Union Tel. Co., 234 U. S. 369, 371, 34 Sup. Ct. 810, 58 L. Ed. 1356." (Italics ours.)

Section 57 of the Judicial Code, above referred to, recognizes in express words the jurisdiction of the Federal Courts of Equity to entertain bills to remove cloud on title to personal property: "When in any suit commenced in any District Court of the United States * * * to remove any incumbrance or lien or *cloud upon the title to* real *or personal* property," etc.

Fisher v. *Brucker, 41 F. (2d) 774,* was a three-judge court case so similar to the case at bar that it merits analysis. That suit, in which the jurisdiction of the court was "properly invoked on the grounds both of diversity of citizenship and the presence of a federal question" (p. 774), involved the construc-

tion and constitutionality of the Michigan inheritance tax statute. The two plaintiffs, legal residents of New York and of Ohio, were the executors under the will of James W. Packard, who died a citizen and resident of New York. The defendants were the attorney general and the auditor general of Michigan. The property involved consisted of 80,000 shares of the capital stock of Packard Motor Company, a Michigan corporation. An inheritance tax was paid on the said shares of stock to the State of New York. The defendants, however, asserted "the claim of a lien on this stock, to secure payment of the tax claimed by them to be payable, under the Michigan inheritance tax laws" and the plaintiffs averred in their bill that this "claim hinders and interferes with the beneficial use and disposal of such stock by the plaintiffs." Thereupon plaintiffs commenced suit, "seeking to restrain the defendants, temporarily and permanently, from attempting to enforce such claimed lien, from hindering the transfer of said stock, and from attempting to enforce against the plaintiffs, with respect to such stock or the transfer thereof, any of the penalties or other provisions of the Michigan inheritance tax laws, such relief being sought on the grounds that such laws, properly construed, do not impose such a tax, and that, if construed as imposing said tax, they abridge the privileges and immunities of the plaintiffs as citizens of the United States, deprive them of property without due process of law, and deny them the equal protection of the laws." The District Court of three judges found that plaintiffs' contentions were correct and issued the injunction.

3. THE REMEDY PROVIDED BY PENNSYLVANIA LAW IS FURTHER INADEQUATE IN THAT IT IS ENTIRELY IN THE CONTROL OF THE ADVERSE PARTY, SUBJECTING PLAINTIFF TO IRREPARABLE DELAY, EXPENSE AND RISK OF LOSS IN SETTLING THE ESTATE.

Under Pennsylvania law, the appellant cannot compel the State officials to make an assessment, nor to bring suit for the amount of the tax found due. In *Bank of Kentucky* v. *Stone (C. C. D. Ky., Harlan, Taft and Lurton, J. J. per Taft, J.), 88 Fed. 383, 391 (affirmed 174 U. S. 799),* the Court held that "a court of equity will not withhold relief from a suitor merely because he may have an adequate remedy at law if his adversary chooses to give it to him. The remedy at law cannot be adequate if its adequacy depends upon the will of the opposing party" (p. 391). Judge Taft pointed out that if the taxpayer awaited its right to defend in a suit to collect taxes, it would run the risk of a penalty of 10% and a fine of $50. a day for every day of its delinquency, from which burden of risk equity could give relief.

The Pennsylvania statute imposes penalty interest at 12% a year for non-payment after one year, and as set forth hereinafter, the appellant is suffering irreparable injury by reason of the tardy determination of this cause. The greater delays of litigation at law, as compared with equity, therefore, imposes on appellant a differential burden of risk which equity may and should relieve. In the case at bar, moreover, as has been pointed out, plaintiff is seeking to remove the cloud of the threatened lien on its property which is preventing the sale thereof pending this litigation and it is and will continue to suffer irreparable injury by reason of the slowness of the legal remedies provided by State law. (See also *Fredenberg* v. *Whitney, 240 Fed. 819, 822;* and compare *Pacific Tel. Co.* v. *Kuykendall, 265 U. S. 196, 205.)*

Time is of the essence of the remedy in this case and, unless equity intervenes, plaintiff, and those for whom they act, will suffer irreparable injury. Clarke died on January 18, 1931. Under his will the executor was directed to sell the pictures and hold the proceeds along with the rest of the residuary estate in trust, paying the income to certain beneficiaries (R. 13). The executor disclosed the facts to the proper Revenue officers of Pennsylvania on March 25, 1931.

A hearing was held on April 20, 1931, when a return was filed under protest. Notwithstanding "repeated requests of plaintiff for an immediate determination of tax liability" (R. 9), defendants had not taken official action (although immediately after payment to New York on July 15, 1932, defendant Schnader orally advised plaintiff that the decision would be adverse) up to the time the present Bill was filed on November 23, 1932, nearly two years after decedent's death and eighteen months after notice to the Revenue officials of the Commonwealth. The executor delayed payment in New York until the last minute, hoping for a decision in Pennsylvania, and then was compelled to elect a probable tax jurisdiction and pay New York to avoid burdensome penalties.

There is no statute of limitations in Pennsylvania against the assessment and collection of such taxes, and it is conceivable that the taxing officials and the Attorney General could have held this question in abeyance for the next twenty years. Under the Pennsylvania statute no appeal can be taken until the taxing officials decide to make a formal appraisement (assessment). Likewise, after assessment, the executor cannot compel the attorney general to bring a suit for collection, in which suit the lower Court says plaintiff can defend. If he chooses not to sue, the lien on the pictures will continue indefinitely. Furthermore, if the Attorney General elects to bring suit for the tax in the name of the Commonwealth, not only would the suit not be removable to the Federal Court, but it is doubtful whether the legality of the assessment could there be collaterally attacked, since the erroneous determination of situs and, therefore, the invalidity of the tax, might not appear on the face of the record. *State* ex rel *Johnson* v. *Merchants & Miners Bank*, 279 Mo. 228, 213 S. W. 815. The bare statement of this possibility, coupled with the history of the case, shows the inadequacy of the remedy in the state courts and the hardship which equity should relieve.

Paragraph 25 of Plaintiff's Bill (R. 10) distinctly averred that the threat of appraisement, assessment and collection by the defendants and the unlawful failure and refusal of the defendant, Metzger, to issue a waiver of taxes for over a year and a half "has caused and is causing immediate irreparable injury to plaintiff in that it is seriously interfering with the proper administration of the Thomas B. Clarke Estate

in the Surrogate's Court of New York and is preventing distribution of the estate to the legatees thereof who are entitled thereto, and is forcing the plaintiff as executor to maintain large cash reserves at a low rate of interest to cover possible taxes in Pennsylvania and the costs of litigation there, including the cost of bonds and of attorneys' fees; and in that the threatened tax constitutes a possible lien and, therefore, cloud on the title of plaintiff to the aforesaid 79 paintings and, consequently, interferes with the sale thereof as provided for in the will of testator."

It will be noticed that the executors in *Fisher* v. *Brucker* (supra, p. 18 hereof) made an almost identical contention, averring that the claim of defendants of a lien on the stock "hinders and interferes with the beneficial use and disposal of such stock by the plaintiffs" (p. 775) and the Court there determined that "the bill was properly filed for the usual injunctive relief, under the general equitable jurisdiction of a federal district court in equity" (p. 778). The lower Court in the case at bar, however, lightly dismissed the facts so alleged in plaintiff's bill as "ordinary incidents in the administration of any estate in which disputed questions have to be litigated" (R. 46). It is submitted, however, that past delays have and future delays will cause irreparable injury to the parties in interest. There is a present loss of income to the beneficiaries and of commissions thereon to the plaintiff executor by reason of the necessity of maintaining large liquid funds at a low rate of interest. The pictures cannot be sold because of the cloud of this tax lien and are producing no income, whereas the proceeds of a sale could be invested profitably. The market for the pictures is destroyed because the executor cannot give a clear title.

Moreover, there is grave danger that unless equity intervenes, the estate will lose the benefit of the 80% credit under the Federal Estate Tax Act. As a matter of fact, this has proved one of the most vexatious and perplexing results of the situation in Pennsylvania, because the federal officials will not allow a credit for either the New York or the Pennsylvania taxes until the matter is settled, and, if the tax should ultimately be held to be payable to Pennsylvania, this credit may be entirely lost because of the statute of limitation relative thereto. Section 301 (b) of the Revenue Act of 1926 as

amended by Section 802 of the Revenue Act of 1932 provides that the 80% credit allowed "shall include only such taxes as were actually paid and credit therefor claimed within four years after the filing of the (Federal Estate Tax) return." That return was filed by plaintiff on January 18, 1932. Nearly a year of the four-year period had elapsed at the time this Bill was filed. As stated, the defendants could have delayed decision for the balance of the term; but even if they had acted promptly, it is highly improbable that the necessary litigation in the Dauphin County Court, the Supreme Court of Pennsylvania and thence to this Court, could have been completed within the balance of the statutory period. *A fortiori*, this would be true if the plaintiff waited on tax suits brought by the Commonwealth and took its appeals therefrom.

The controlling law on this point is found in the rule that equity will assume jurisdiction if the remedy at law is not "reasonably prompt and efficacious."

Stewart Dry Goods Co. v. *Lewis, 53 S. Ct. 68, 69;*
Clark v. *Pigeon River, etc. Co. (C. C. A. 8), 52 F. (2d) 550, 557;*
Cf. Ex parte Young, 209 U. S. 123, 163.

The statutory right of appeal to the Dauphin County Court provided by the Pennsylvania Act of 1929 is further subject to the objection that in order to take such an appeal the taxpayer must post a bond in double the amount of the estimated tax and even though he thereafter succeeds in his appeal there is no restitution of the cost of the bond. In the present case there would be a tax of approximately $50,000. and a bond of approximately $100,000., costing at least $1,000. a year. If litigation lasted three years, a not unreasonable assumption, this bond would cost $3000., and the whole amount thereof would be lost even though the taxpayer were successful. It is submitted that this is not an ordinary incident of litigation. It is not like the case of a comparatively small bond put up for costs of suit. The situation is analogous to cases in which it was held that a suit for refund is an inadequate remedy at law where no interest can be recovered in the suit.

Hopkins v. *Southern Cal. Tel. Co., 275 U. S. 393;*
Nutt v. *Ellerbe, 56 F. (2d) 1058, 1063;*
Southern Ry. Co. v. *Query, 21 F. (2d) 333, 342.*

II. The Court Below Erred in Not Granting the Equitable Relief Prayed for in the Bill.

While of course the primary question presented on this appeal is merely the jurisdiction of the lower Court, sitting in equity, to grant the relief, nevertheless this Court unquestionably has power and authority now to make final disposition of the case, if in its discretion it sees fit to consider the merits and to enter a final decree.

Smith v. *Vulcan Iron Works, 165 U. S. 518, 525;*
Denver v. *Denver Union Water Co., 246 U. S. 178, 182;*
North Carolina R. R. v. *Story, 268 U. S. 288, 292.*

There being no dispute as to the facts, and the question involved being one which must in any event be brought back to this Court for decision, it is hoped that this Court will not permit the error of the lower Court to deprive this plaintiff of the expedited final adjudication which Congress, by Section 266 of the Judicial Code, has attempted to prescribe for this important class of cases. The question presented involves solely the construction and elaboration of this Court's recent decisions on the constitutional rights of different States to impose inheritance taxes on the same property, so that an opinion by the lower Court would not be as important as if the facts were complicated or disputed, or as if the question were one at common law. Furthermore, there are particular reasons why this Court might consider it proper to exercise its power in this case. As suggested above, prompt relief is necessary because delays are working irreparable injury to the estate. This suit has already been before the Federal courts for approximately a year and the dispute had been before the state authorities for a year and a half prior thereto. This has resulted in serious loss of income to the estate from inability to complete the administration. A comparatively short additional delay will lose to plaintiff the right to the 80% credit against the Federal Inheritance Tax in case the right of Pennsylvania to the tax claimed be sustained.

By four important recent decisions, this Court has "progressively applied" the principle limiting the constitutional right of more than one State to impose inheritance taxes on the transmission, by a given decedent, of a specific item of property, and defining the tests by which to determine which of several contending states may collect the tax under given circumstances:

Frick v. *Pennsylvania, 268 U. S. 473;*
Farmers Loan & Trust Co. v. *Minnesota, 280 U. S. 204;*
Safe Deposit & Trust Co. v. *Virginia, 280 U. S. 83;*
First Nat'l Bank of Boston v. *Maine, 284 U. S. 312.*

While none of these cases expressly covers the precise question here presented, the principles enunciated in them, in the light of the prior decisions by this Court, clearly support the position of plaintiff below and the present appellant,—that the seventy-nine paintings temporarily loaned by Clarke to the Pennsylvania Museum had, at his death, no legal situs in Pennsylvania sufficient to warrant the exaction by Pennsylvania of an inheritance tax on their transfer from a New York decedent to his New York legatees.

Frick v. *Pennsylvania, 268 U. S. 473*, presented a case converse to that at bar. There Frick, a resident of Pennsylvania, had a collection of rare paintings and works of art permanently housed in a building in New York City especially constructed for that purpose and known as "The Frick Collection." He also had certain paintings, objects of art, furniture, etc., at his summer home in Massachusetts. Pennsylvania claimed a right to impose an inheritance tax upon these items of tangible personal property, but this Court held that such a tax could not be imposed under the Fourteenth Amendment because the property had an "actual situs" in New York and in Massachusetts respectively, saying (p. 496):

> "* * * that the Pennsylvania statute, in so far as it attempts to tax the transfer of tangible personalty having an *actual situs* in other States, contravenes the due process of law clause of the Fourteenth Amendment and is invalid." (Italics ours.)

The decision clearly pointed out that an inheritance tax on such items could be imposed only by the State where they had an actual situs. The Court did not, however, there define what

it meant by "actual situs" because the situation was clear in that respect. The Frick property held taxable outside of Pennsylvania consisted of the Frick Collection of paintings, housed permanently in a special building in New York City and bequeathed by Frick to New York, and of furniture in his New York residence and in his summer home in Massachusetts, in each case a part of his permanent establishments in those localities. New York was the permanent address of the Frick Collection, as well as of his furnished New York residence. Massachusetts was the permanent address of his furnished summer home at Pride's Crossing. These were the respective States where, in the language of the later Maine case, the property was "*kept and used.*"

In *Safe Deposit & Trust Co.* v. *Virginia, 280 U. S. 83,* however, the Court referred to the Frick case and said (p. 93):

> "Tangible personal property *permanently* located beyond the owner's domicile may not be taxed at the latter place. *Union Refrig. Transit Co.* v. *Kentucky, supra; Frick* v. *Pennsylvania, supra.*" (Italics ours.)

Later on, in the opinion, the Court speaks of the "definite" taxable situs (p. 93):

> "Here we must decide whether intangibles—stocks, bonds—in the hands of the holder of the legal title *with definite taxable situs* at its residence, not subject to change by the equitable owner, may be taxed at the latter's domicile in another State." (Italics ours.)

And again the Court speaks of "a permanent situs for lawful taxation" (p. 92):

> "Here, where the possessor of the legal title holds the securities in Maryland, thus giving them a *permanent situs for lawful taxation* there, and no person in Virginia has present right to their enjoyment or power to remove them, the fiction must be disregarded." (Italics ours.)

In *Farmers Loan & Trust Company* v. *Minnesota, 280 U. S. 204,* this Court, overruling *Blackstone* v. *Miller, 188 U. S. 189,* and modifying a part of its decision in the Frick case, held that stocks and bonds were subject to inheritance tax only by the State of the domicile. Referring to the Frick case, the Court said (p. 210):

"At this time it cannot be assumed that tangible chattels *permanently* located within another State may be treated as part of the universal succession and taken into account when estimating the succession tax laid at the decedent's domicile. *Frick* v. *Pennsylvania* is to the contrary." (Italics ours.)

By the above-quoted statements the Court interpreted the phrase "actual situs" as used in the Frick case, holding that tangible chattels acquire an "actual situs" in a State other than that of the decedent's domicile only when they are "permanently located" in such new State and acquire a "permanent situs for lawful taxation there."

In *First National Bank of Boston* v. *Maine, 284 U. S. 312,* the Court held that Maine could not constitutionally impose an inheritance tax upon the estate of a Massachusetts decedent with reference to shares of stock in Maine corporations owned by the testator at the time of his death. In the opinion the Court thus reviewed its decisions on the subject of inheritance tax jurisdiction (p. 326):

"It long has been settled law that real property cannot be taxed, or made the basis of an inheritance tax, except by the state in which it is located. More recently it became settled that the same rule applies with respect to tangible personal property. And it now is established by the three cases last cited that certain specific kinds of intangibles, namely, bonds, notes and credits, are subject to the imposition of an inheritance tax only by the domiciliary state; and this notwithstanding the bonds are registered in another state, and the notes secured upon lands located in another state, resort to whose laws may be necessary to secure payment.

"The rule of *immunity from taxation by more than one state,* deducible from the decisions in respect of these various and distinct kinds of property, *is broader than the applications thus far made of it.* In its application to death taxes, the rule rests for its justification upon the *fundamental conception* that *the transmission from the dead to the living of a particular thing, whether corporeal or incorporeal, is an event which cannot take place*

in two or more States at one and the same time. In respect of tangible property, the opposite view must be rejected as connoting a physical impossibility; in the case of intangible property, it must be rejected as involving an inherent and logical self-contradiction. Due regard for the processes of correct thinking compels the conclusion that a determination fixing the local *situs* of a thing for the purpose of transferring it in one state, carries with it an implicit denial that there is a local *situs* in another state for the purpose of transferring the same thing there. The contrary conclusion as to intangible property has led to nothing but confusion and injustice by bringing about the anomalous and grossly unfair result that one kind of personal property cannot, for the purpose of imposing a transfer tax, be within the jurisdiction of more than one state at the same time, while another kind, quite as much within the protecting reach of the Fourteenth Amendment, may be, at the same moment, within the taxable jurisdiction of as many as four states, and by each subjected to a tax upon its transfer by death, an event which takes place, and in the nature of things can take place, in one of the states only.

"A transfer from the dead to the living of any specific property is an event single in character and is effected under the laws, and occurs within the limits, of a particular state; and it is unreasonable, and incompatible with a sound construction of the due process of law clause of the Fourteenth Amendment, to hold that jurisdiction to tax that event may be distributed among a number of states." (Italics ours.)

Later on, the Court lays down as the test of actual situs the place where the property is *"kept and used"* (p. 329):

"This ancient maxim *(mobilia sequuntur personam)* had its origin when personal property consisted, in the main, of articles appertaining to the person of the owner, such as gold, silver, jewels and apparel, and, less immediately, animals and products of the farm and shop. Such property was usually under the direct supervision of the owner and was often carried about by him on his

journeys. Under these circumstances, the maxim furnished the natural and reasonable rule. In modern times, due to the vast increase in the extent and variety of tangible personal property not immediately connected with the person of the owner, the rule has gradually yielded *to the law of the place where the property is kept and used.*" (Italics ours.)

And in the next paragraph the Court links up the right to tax to a *"real taxable relationship"* to the power of the state to control the privilege of succession (p. 329):

> "And since death duties rest upon the power of the state imposing them to control the privilege of succession, the reasons which sanction the selection of the domiciliary state in the various cases first named, sanction the same selection in the case last named. In each case, there is wanting, on the part of a state other than that of the domicile, *any real taxable relationship to the event which is the subject of the tax.*" (Italics ours.)

In the Court below, defendant relied on *Blodgett* v. *Silberman*, *277 U. S. 1*, where this Court held that $287.48 of coin and bank notes, kept by a Connecticut decedent in a safe deposit box in New York City (where the decedent was active in business as a partner in a brokerage firm), might not be subjected to inheritance tax by Connecticut. It did not there appear that the coin and bank notes had ever been in Connecticut or that they were ever to be taken or kept or used by the decedent there. From the fact that they were kept in the safe deposit box in New York, it would appear that they were for use in connection with the decedent's New York affairs. This Court considered that this cash had been "so definitely fixed and separated in its actual situs from the person of the owner" that it belonged permanently in New York, as did the paintings and furniture in the Frick case.

The above case is obviously no authority for the position that pictures, originally located permanently in New York, lost their New York domicile and acquired a taxable situs in Pennsylvania merely by reason of a temporary sojourn in Pennsylvania at the request of the people of Pennsylvania, for mere temporary display and not part of the permanent exhibition.

In determining whether or not situs in Pennsylvania was temporary or permanent, reference may be had to some of the older decisions dealing with property taxation.

In *Hays* v. *The Pacific Mail Steamship Co., 58 U. S. 596,* the taxpayer, a New York corporation, engaged in the shipping business, complained of the assessment and collection of property taxes in California upon its ships that put into California ports. This Court upheld the taxpayer, saying (p. 599):

> "She is within the jurisdiction * * * *temporarily,* and for a purpose wholly excluding the idea of *permanently* abiding in the State, or changing her home port."
>
> * * * * * * * *
>
> "We are satisfied that the State of California had no jurisdiction over these vessels for the purpose of taxation; they were not, properly, abiding within its limits, so as to become incorporated with the other personal property of the State; they were there but *temporarily,* engaged in lawful trade and commerce, with their *situs* at the home port, where the vessels belonged, and where the owners were liable to be taxed for the capital invested, and where the taxes had been paid." (Italics ours.)

In *Union Refrig. Transit Company* v. *Kentucky, 199 U. S. 194,* this Court held that a Kentucky corporation could not be subjected to property taxation in Kentucky with reference to refrigerator cars permanently employed without the State. In the course of the opinion the Court uses the word "permanently" ten different times, laying emphasis upon the permanence of the location of said property outside of Kentucky and, distinguishing the case of *Commonwealth* v. *American Dredging Co., 122 Pa. 386,* which it apparently approved, upon this basis (p. 208):

> "In *Commonwealth* v. *American Dredging Company,* 122 Penna. St. 386, it was held that a Pennsylvania corporation was taxable in respect to certain dredges and other similar vessels which were built, but not permanently retained outside of the State. It was said that the non-taxability of tangible personal property located permanently outside of

the State was not 'because of the technical principle that the *situs* of personal property is where the domicil of the owner is found. This rule is doubtless true as to intangible property such as bonds, mortgages and other evidences of debt. But the better opinion seems to be that it does not hold in the case of visible tangible personal property *permanently* located in another State. In such cases it is taxable within the jurisdiction where found and is exempt at the domicil of the owner.' *The property in that case, however, was held not to be permanently outside of the State, and therefore not exempt from taxation.*" (Italics ours.)

In *Delaware, etc. R. R. Co.* v. *Pa., 198 U. S. 341,* the Court was considering the capital stock tax upon a Pennsylvania corporation with reference to coal that had been sent out of the state for sale. It was held that the tax was essentially a property tax upon the coal. The Pennsylvania Supreme Court held that the coal was only temporarily located outside the state and, therefore, could be taxed by Pennsylvania. This Court held, however, that the coal had been sent out of Pennsylvania never to return and, therefore, could not be taxed in Pennsylvania. The Court distinguished the American Dredging Company case on this ground, saying (p. 356):

"The asserted transitory nature of this property does not seem to us to be material. At the time of the appraisement it had been transported beyond the jurisdiction of the State, *never to return in kind,* but was intended to be sold in the foreign State. Such property is entirely unlike the property involved in *Commonwealth* v. *American Dredging Co., 122 Pa. St. 386.* That property consisted of vessels, or scows, or tugs, only *temporarily* out of the State of Pennsylvania, for the purpose of engaging in business, and liable to return to the State at any time, and was without any *actual situs* beyond the jurisdiction of the State itself. However temporary the stay of the coal might be in the particular foreign States where it was resting at the time of the appraisement, it was *definitely* and *forever* beyond the jurisdiction of Pennsylvania."

* * * * * * * *

> "* * * the coal had lost *its situs* in Pennsylvania by being transported from that State to foreign States for the purpose of sale, *with no intention* that it should ever return to its State of origin." (P. 360.) (Italics ours.)

While in that case the Court referred to the fact that the coal had been shipped out of Pennsylvania for sale, the importance of this was merely to support the fundamental conclusion that the coal had permanently left Pennsylvania, *"never to return."* In the case at bar, it is not contended that the Clarke pictures were sent out of New York for the purpose of selling them—the idea of a sale did not occur either to the testator or to Mr. Kimball until the spring of 1929, a year after the original loan. While, at Mr. Kimball's request, Mr. Clarke then expressed his willingness to sell the collection, this came to nothing, since Mr. Kimball was unable to find a donor able and willing to undertake the proposed gift.

The essential point in this coal case was that the coal had been sent out of Pennsylvania *never to be returned* and, therefore, Pennsylvania had lost its right to impose a property tax thereon. In the case at bar Thomas B. Clarke sent the pictures to Pennsylvania for purpose of a temporary loan and clearly intended that they should be returned to him in New York City.

It should also be remembered that these pictures were collected by Mr. Clarke at his residence in New York City over a period of thirty years and that the duration of the loan in Pennsylvania, compared to the duration of their location in New York City, was comparatively short. Until the death of Mr. Clarke the pictures of necessity had an actual situs in the State of New York for purposes of taxation and defendants must establish the point that the brief original loan, with its several renewals, to the Pennsylvania Art Museum not only created a new "actual situs" in Pennsylvania but deprived the pictures of their original "actual situs" in New York State. The presumption should be against such a change in situs, on the analogy of those cases which hold that an original domicile is not lost until a new legal residence is clearly acquired.

This reasoning was voiced by this Court in *New York Central Railroad* v. *Miller, 202 U. S. 584.* In that case the State of

New York was attempting to impose a franchise tax—admitted to be a direct property tax—upon cars belonging to a New York corporation which were at times temporarily absent from the State. The railroad contended that a considerable proportion of its cars were constantly out of the State and that such a proportion should be deducted from the taxable value of its capital stock. This Court rejected this argument and said (p. 596):

> "Suppose, then, that the State of New York had taxed the property directly, there was nothing to hinder its taxing the whole of it. It is true that it has been decided that property, even of a domestic corporation, cannot be taxed if it is permanently out of the State. *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, 201, 211; *Delaware, Lackawanna & Western R. R.* v. *Pennsylvania*, 198 U. S. 341; *Louisville & Jeffersonville Ferry Co.* v. *Kentucky*, 188 U. S. 385. But it has not been decided, and it could not be decided, that a State may not tax its own corporations for all their property within the State during the tax year, even if every item of that property should be taken successively into another State for a day, a week, or six months, and then brought back. Using the language of domicil, which now so frequently is applied to inanimate things, the state of origin remains the permanent situs of the property, notwithstanding its occasional excursions to foreign parts. *Ayer & Lord Tie. Co.* v. *Kentucky*, May 21, 1906, *ante*, p. 409. See also *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, 208, 209"

If, as suggested by this Court in the above case, we follow the analogy of loss and acquisition of domicile, treating the pictures as original residents of New York who, it is contended, acquired a new domicile in Pennsylvania, the solution is simple.

> *Sun Printing & Publishing Assn.* v. *Edwards*, 194 U. S. 377, 383.
>
> "* * * it is elementary that, to effect a change of one's legal domicil, two things are indispensable: First, residence in a new domicil; and, second, the intention to

remain there. The change cannot be made, except *facto et animo*. Both are alike necessary. Either without the other is insufficient. Mere absence from a fixed home, however long continued, cannot work the change. *Mitchell* v. *United States*, 21 Wall. 350."

Suppose that, instead of lending Dr. Kimball 79 paintings, Mr. Clarke had lent 79 New York workmen to help build the new Museum. Suppose further that this loan had been originally for six months and had been renewed from time to time at Kimball's request, but without any thought on the part of Clarke or of the workmen that they would not all go back to New York when their job was done, or sooner if Mr. Clarke needed their services at home. Could it be said that the mere fact that they lived for two years and ten months in the workmen's camp at the site of the building, all still on Clarke's payroll, would have lost them their New York citizenship or have given Pennsylvania the right to impose an inheritance tax on the estates of any who died before Mr. Clarke actually summoned them home?

In the case at bar there was no intimation of any purpose on Mr. Clarke's part to have the pictures remain permanently in Pennsylvania. They were merely loaned to Pennsylvania from week to week. Their domicile was New York and remained New York at the time of Mr. Clarke's death.

CONCLUSION.

It is respectfully submitted that the judgment of the Court below should be reversed with directions to award the injunction as prayed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

No. 84. OCTOBER TERM, 1933.

CITY BANK FARMERS TRUST COMPANY, Executor under the Will of THOMAS B. CLARKE, Deceased, Appellant,

v.

WILLIAM A. SCHNADER, Attorney General of the Commonwealth of Pennsylvania, and LEON D. METZGER, Secretary of Revenue of the Commonwealth of Pennsylvania.

REPLY TO BRIEF FOR APPELLEES.

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REPLY TO BRIEF FOR APPELLEES.

The point that Appellant had failed to exhaust its administrative remedy in the State Courts was not raised by defendants in their answer in the Court below; nor was it raised in the oral argument or in defendants' brief in the Lower Court or considered by the Lower Court. Indeed, the Lower Court in its opinion (R. 44, l. 9) specifically referred to the possible proceedings in the State Court as a *"judicial determination."* It was first urged by Appellees in their brief filed on November 6, three days before the argument in this Court. Leave was accordingly asked to file the present supplemental brief to enable Appellant to discuss the principle of *Porter* v. *Investors Syndicate, 286 U. S. 461,* relied on in Appellees' brief, and *Prentis* v. *Atlantic Coast Line Co., 211 U. S. 210,* the leading case on which the Porter case is based, Appellees' new position being that the appeal allowed by Pennsylvania law from the action by the Department of Revenue to the Dauphin County Court constituted an administrative remedy which Appellant had failed to pursue before resorting to the Federal Court.

In quoting, in part, the Pennsylvania Statute on page 10 of Appellees' brief, in support of their contention that the proceedings are *"de novo,"* Appellees fail to state that the right of appeal is confined to the taxpayer. They characterize as immaterial and omit from their quotation of the language of the Act

the provision which expressly confines the consideration of the Dauphin County Court to the *objections* specified in the appeal from the appraisement. The provision is as follows:

> "§1202a. APPEAL TO COMMON PLEAS OF DAUPHIN COUNTY; OBJECTIONS TO APPRAISEMENT TO BE SPECIFIED
>
> Any person not satisfied with such appraisement as made by an appraiser appointed by the Auditor General may appeal, within thirty days, to the court of common pleas of Dauphin County, on paying or giving security to pay all costs, together with whatever tax shall be fixed by the court. *The appeal shall specify all the objections to said appraisement, and any objections not specified in the appeal shall not be considered by the court.* Upon such appeal, the court may determine all questions of valuation and the liability of the appraised estate for such tax, subject to the right of appeal to the Supreme or Superior Court. (1919, June 20, P. L. 521, §27, as amended 1931, June 22, P. L. 689, §2.)" (P. S. Sec. 1202a, p. 18 of 1932 Supplement.) (Italics ours.)

Clearly, under this provision requiring the bond to cover the tax, only the taxpayer can appeal. Clearly, also, the provision confining the questions on appeal to those specified in the objections specified by the appellant negative the conclusion that the proceeding is in all respects *de novo*.*

* The Court's function is merely to decide whether or not the valuation fixed by the Revenue Department is excessive. Com. v. Manor Gas Coal Co., 2 Dauph. Co. (Pa.) 121.

Apparently, also, appeals from the appraisement of taxes are regarded by the Pennsylvania Courts and Legislature as civil cases to which Article I, section 6 of the Pennsylvania Constitution, requiring jury trials in all civil cases, is applicable. (See, for example, *Com.* v. *Hudson Coal Co., 28 Dauph. Co. 245,* relative to anthracite coal tax.) Certainly a proceeding involving a jury trial is a judicial one.

The foregoing considerations support the conclusion that on appeal to the Dauphin County Court, that Court exercises judicial and not legislative or administrative functions.

The function of the Dauphin County Court in these tax appeals is confined to the determination of a liability on account of past events. It cannot be called upon to prescribe rules for future conduct. Applying the test laid down in *Prentis* v. *Atlantic Coast Line Co., 211 U. S. 210, 226,* for the determination of when a tribunal is exercising judicial functions, the Dauphin County Court "investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist." It does not purport to make "a rule for the future."

Nor, as in *Porter* v. *Investors Syndicate, 286 U. S. 461,* is the Dauphin County Court called on to make an order defining the conditions on which the appellant in a tax case shall be permitted to exercise privileges *in the future.* All that the Dauphin County Court is empowered to decide is how much, if any-

thing, this Appellant owes the State, under existing laws, on account of decedent's death, in the past, owning certain specific property.

Attention is called to the essential distinction between the determination of a valuation to be used as the basis for the allowance of future rates, and cases like the present where the valuation is to be the basis only of a present liability for an obligation based on accomplished facts.

Irrespective, however, of whether or not, when the Dauphin County Court is called on to approve or reduce the valuation fixed by the Revenue Department, it might be said to exercise administrative functions, it is clear that it cannot be called upon to exercise any such functions *in the case at bar,* since there is no dispute as to the valuation of the paintings here involved (see par. 7 of the Bill and Answer, R. pp. 4 and 35).

In *Prentis* v. *Atlantic Coast Line Co., 211 U. S. 210,* this Court pointed out clearly at page 226 that in cases of this kind the "question depends not upon the character of the body but upon the character of the proceedings." It matters not what may be the functions of the court in some other case, but only what they may be in the particular case under consideration. The fact that a court is empowered to grant liquor licenses or to prescribe Rules of Court or to pass on the qualifications of the lawyers seeking to practice before it does not affect the character of its purely judicial functions.

The *Prentis* case was an appeal by the Virginia Railroad Commission, defendant below, from a decree of the Circuit Court overruling a demurrer by defendant to a bill filed by the railroad to enjoin the enforcement of a schedule of passenger fares alleged to be confiscatory. The rates in question were to operate for the future. This Court found that the Commission's functions were both legislative and judicial, and that if it were here exercising judicial functions the United States Courts would be powerless to interfere with it. This Court said, however (p. 226):

> "Proceedings legislative in nature are not proceedings in a court within the meaning of Rev. Stats. §720, no matter what may be the general or dominant character of the body in which they may take place. *Southern Ry. Co.* v. *Greensboro Ice & Coal Co., 134 Fed. Rep. 82, 94,* affirmed *sub nom. McNeill* v. *Southern Ry. Co., 202 U. S. 543.* That question depends not upon the character of the body but upon the character of the proceedings. *Ex parte Virginia, 100 U. S. 339, 348.* * * *"

The basis for the decision and the essential difference between it and the case at bar is found in this Court's distinction of the Prentis case from that in *McNeill* v. *Southern Ry. Co., 202 U. S. 543,* as follows (p. 231):

> "It is proper before closing to mention one decision that was relied upon by the appellees, and one or two other matters peculiar to the

cases before the court. In *McNeill v. Southern Ry. Co., 202 U. S. 543*, the same moment was selected for bringing suit as in these cases, while an examination of the laws of North Carolina discloses that there were statutory provisions for appeal somewhat similar to those in the Virginia constitution, to which we now are referring. But, apart from other differences, *in that case the ground of the decree was that the state commission was dealing with a subject-matter beyond its power; no regulation would have been valid, 202 U. S. 561, and the considerations to which we now are giving weight naturally were not urged.* * * *" (Italics ours.)

This Court there clearly implies that if the question had been not as to whether, under the facts, the rates were fixed at a figure which was confiscatory, but whether the Commission had no power to fix *any* rates, the decision would have been different.

The Prentis case, therefore, for the purposes of the present discussion, is authority for two essential propositions: *first*, that the inquiry in cases of this nature is as to the nature of the functions which the tribunal is *then exercising*, and not as to the powers and functions which theoretically it *might have* but was *not then actually exercising; second*, that where the inquiry is as to whether the body is dealing with a subject-matter beyond its power, it is unimportant that an appeal may be had to a higher state tribunal which, if the first tribunal is without power, will be equally powerless. Since, in the case at bar, the only

question at issue is as to the constitutional power of the State to exact *any tax at all*, there can be no question as to the exercise of legislative or administrative functions. An examination of all the decisions of this Court in which *Prentis* v. *Atlantic Coast Line Co., 211 U. S. 210*, has been cited, fails to disclose any in which the principle of that decision, requiring the exhaustion of the local legislative and administrative remedies before resorting to the Federal Court, has ever been applied to a proceeding in a State tribunal involving solely the determination of the constitutional right of State Officials, under the circumstances stated, to exact any tax at all.

The mere fact that the present bill was brought before the tax in question had been actually assessed does not make the present bill premature. In *Risty* v. *Chicago, R. I. & Pac. Ry. Co., 270 U. S. 378, 388*, this Court said (p. 388):

> "* * * As the principal ground for appellees' suits was the invalidity of the whole proceeding and not merely inequality in apportionment of benefits, and as the effect of the proposed equalization would have been to bring the lands of appellees into the newly established drainage district and subject them to *future assessment* for construction costs and for maintenance, *the threatened injury was imminent and the suits were not premature.* The assessment, if made, would have established a lien on the appellees' property which would be a cloud on title—to say nothing of the fact that the effect of the pending proceeding would have been to subject

> their property to future assessments; hence the case was one for equitable relief unless there was a plain and adequate remedy at law. * * *"
> (Italics ours.)

See also *Chicago G. W. Ry.* v. *Kendall, 266 U. S. 94.*

In *Porter* v. *Investors Syndicate, 286 U. S. 461,* the question was as to whether or not the State officer had exercised a proper administrative discretion in revoking Appellant's Blue Sky permit, which of course the State officer had power to revoke for proper cause and in a proper manner. In the case at bar, under the facts admitted by the State officials, they had no power or jurisdiction to impose *any* tax on this property, since under the decisions of this Court it was not within their jurisdiction. *Our objection is not to an excessive valuation, but to the imposition of any tax at all.*

The only question in this controversy is as to whether the State will persist in its attempt to impose *any* tax on this property. This has been settled by Attorney General Schnader, who is the final executive authority in Pennsylvania as to the purpose of the State in attempting to collect the tax. The question was referred to him by the Department of Revenue for decision (par. 19 of Bill, Rec. p. 9, and par. 19 of Answer, Rec. p. 37), and he decided that State authorities would persist in their attempt to collect the tax and

so advised the Executors (par. 22 of Bill and Answer, Rec. pp. 9-10 and 38). Irrespective of what might be the functions of the Dauphin County Court in some other case, its function in this case can be only and purely judicial, since the only question for it to decide would be as to the constitutional power of Pennsylvania to exact any tax at all on account of the transfer from this New York decedent of this particular property.

In Porter *v.* Investors Syndicate, 286 U. S. 461, 471, Mr. Justice Roberts said, in the course of the opinion:

> "The present case is not one in which the review of the commissioner's action is judicial in character. If it were, the authorities cited by appellee which hold that one competent to invoke the jurisdiction of the federal courts is not bound to pursue a judicial review in the state courts would apply. See *Bacon* v. *Rutland R. Co., 232 U. S. 134; Prendergast* v. *New York Tel. Co., 262 U. S. 43; Railroad Commission* v. *Duluth St. Ry. Co., 273 U. S. 625.* * * *"

The present case is distinguishable from that case on a further ground. On page 469, the Court said:

> "But we are told that the commissioner asserted his intention to enforce the order, and that the statute forbids the state court to afford interlocutory relief. Thus, says the appellee, though trial might result in a decision vacating the com-

missioner's order, *in the interval irreparable harm would have been done* by the revocation of the company's permit, and its officers and agents rendered liable to criminal prosecution. Such a state of the law, it is insisted, amounts to a denial of due process to which one confronted with the possible loss of property is not bound to submit but may at once, if there be the requisite diversity of citizenship and amount in controversy, apply to a federal court for relief. *Conceding the correctness of the premises, the conclusion is sound.* Pacific Telephone Co. *v.* Kuykendall, 265 U. S. 196. * * *" (Italics ours.)

The Court then went on to hold that, under the Statutes of Montana, plaintiff was entitled, upon a proper showing, to obtain a stay, and that therefore irreparable injury to complainant did not appear.

In the case at bar irreparable injury is threatened in the existence of the lien;* in the expense

* In connection with Mr. Schnader's statement at the oral argument that there was no lien for inheritance taxes, under Pennsylvania Law, we quote the Statute (72 P. S. § 1401):

"§ 1401. Liens of Taxes, Interest, Penalties, and Other Accounts Due to the Commonwealth

All State taxes imposed under the authority of any law of this Commonwealth, now existing or that may hereafter be enacted, and unpaid bonus, interest, penalties, and all public accounts settled against any corporation, association, or person, shall be a first lien upon the franchises and property, both real and personal, of such corporation, association, or person, from the date of settlement, and whenever the franchises or property of a corporation, association, or person, shall be sold at a judicial sale, all taxes, interest, bonus, penalties, and public accounts, due the Commonwealth, shall first be allowed and paid out of the proceeds of such sale, before any judgment, mortgage, or any other claim or lien against such corporation, association, or person, *but the lien of transfer inheritance taxes shall be limited to the property chargeable therewith, and, unless such taxes shall be sued for within five years after they are due, they shall cease to be a lien as against any purchaser of real estate.* (1929, April 9, P. L. 343, art. XIV, § 1401.)" (Italics ours.)

of the bond (not merely for costs, but for the tax also), for which Appellant will have no redress even if he is successful; in the damage from the delay in assessing the tax, which Appellant is powerless to expedite; and in the serious risk of losing the 80% credit on the Federal tax, if the final decision on the liability for the Pennsylvania tax is too long delayed (see pp. 17-23 of our principal Brief).

If the present contention of the Appellees is sound, at what point can this New York citizen avail himself of his Federal right to have determined by the Federal Court his constitutional right to immunity from taxation by Pennsylvania?

The taxpayer in this case is not bound to come to the Federal Court with the facts found against him. *Chicago, B. & Q. R. R.* v. *Osborne, 265 U. S. 14.*

In *R. R. Com.* v. *Duluth St. Ry., 273 U. S. 625, 628,* this Court said:

> "* * * *it must be remembered that the requirement that state remedies be exhausted is not a fundamental principle of substantive law but merely a requirement of convenience or comity.* Where as here a constitutional right is insisted on, we think it would be unjust to put the plaintiff to the chances of possibly reaching the desired result by an appeal to the State Court when at least it is possible that as we have said it would find itself too late if it afterwards went to the District Court of the United States. *Pacific Telephone & Telegraph Co.* v. *Kuykendall, 265*

U. S. 196. Oklahoma Natural Gas Co. v. Russell, 261 U. S. 290." (Italics ours.)

It is therefore respectfully submitted:

First: That the functions of the Dauphin County Court in hearing appeals from the State Appraisers, being confined to the determination of the amount of the tax due on account of past events and not involving the power to fix a valuation to be used as the basis for the exercise of a future right, are essentially judicial.

Second: That the question is not as to the general powers of the Dauphin County Court in all cases, or even in all cases arising on tax appeals, but as to the powers and functions which may be exercised by that Court in this particular case. The sole question for the determination either of the Dauphin County Court or of the Federal Courts in this case is the power of the State of Pennsylvania, under the Constitution of the United States, to exact inheritance tax from the estate of a New York decedent, on specific property, under undisputed facts. No more purely judicial question than this could well be imagined.

Third: That even if the possible appeal to the Dauphin County Court were considered as a quasi-legislative or administrative remedy, nevertheless Appellant, being confronted with irreparable injury incident to an appeal to the Dauphin County Court,

was not bound to submit to possible loss therefrom, but had the right at once, there being the requisite diversity of citizenship and amount in controversy, to apply to the Federal Court for relief.

Respectfully submitted,

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H. GORDON McCOUCH,
Counsel for Appellant

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933. No. 84.

CITY BANK FARMERS TRUST COMPANY, Executor under the Will of THOMAS B. CLARKE, Deceased, Appellant,

v.

WILLIAM A. SCHNADER, Attorney General of the Commonwealth of Pennsylvania, and LEON D. METZGER, Secretary of Revenue of the Commonwealth of Pennsylvania.

BRIEF FOR APPELLEES

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

WM. A. SCHNADER,
Attorney General of the Commonwealth of Pennsylvania.

HARRIS C. ARNOLD,
Deputy Attorney General.
Attorneys for Appellees.

State Capitol,
Harrisburg, Pa.

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IN THE

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v.

WILLIAM A. SCHNADER, Attorney General of the Commonwealth of Pennsylvania, and LEON D. METZGER, Secretary of Revenue of the Commonwealth of Pennsylvania.

On Appeal from the District Court of the United States for the Eastern District of Pennsylvania, September Term, 1932, No. 7395, Unreported Opinion March 24, 1933 (R. 41).

BRIEF FOR APPELLEES

CORRECTIONS OF AND ADDITIONS TO APPELLANT'S STATEMENT OF THE CASE

To prevent any possible confusion as to the exact facts of this case, we feel it necessary to make certain

corrections of and additions to the appellant's statement of the case.

Corrections

Our references are to the pages of Appellant's Brief:

Page 2. "The term [of the loan] contemplated was about six months."

There is no such statement anywhere in the pleadings or the "Stipulation as to Certain Facts" (R. 40).

On the contrary, in its "Application for Appraisement and Waiver of Transfer Inheritance Tax Provisions", a part of which is quoted in Paragraph 18 of the Bill of Complaint (R. 8), appellant frankly conceded that **"no definite time was fixed as the duration of the loan".**

The injunction affidavit of Dr. Kimball (R. 27) stated (R. 28) that, "The term originally contemplated was about six months, although there was no definite understanding regarding the matter."

But this allegation was not made in the Bill of Complaint nor was it incorporated in the Stipulation (R. 40); and it is not admitted as a fact by the appellees.

Bottom of page 2. "* * * the pictures were permitted * * * to remain * * * with the understanding that they would be returned to Clarke **in New York** at any time on his request."

There is absolutely no justification for the presence of the phrase "in New York", in this statement.

Page 3. "It is customary for public museums to secure exhibitions in this manner, and the period for which the Clarke collection was held by the Museum prior to his death was shorter than the usual period of such loans."

This is rather a loose paraphrase of the statement made in Paragraph 10 of the Bill of Complaint (R. 4) that "such accommodation loans of works of art [to the Pennsylvania Museum] * * * have been continued **for an average period** considerably longer than the period from the date of the original loan in question to the death of the said Thomas B. Clarke."

Pages 4 and 5. At the top of page 4 appellant intimates that Pennsylvania has deliberately delayed a hearing on the appraisement of the Clarke paintings. It says, "To date the hearing has not been held." And on page 5, the statement is made that action by the defendants "has already been delayed for almost three years".

These statements are rather unfair.

On November 25, 1932 (R. 1) appellant obtained a restraining order (R. 31) from Judge Kirkpatrick of the District Court. That order remained effective until April 11, 1933 (R. 2) when the Bill of Complaint was dismissed. On the same day an appeal was taken to this court.

Additions

When the pictures were sent to Pennsylvania, Mr. Clarke surrendered his lease for the storage space in a New York warehouse where sixty-three of the pic-

tures had been kept (R. 34, 35). Thereafter, Mr. Clarke paid no rentals for storage space or any other storage charges on account of these pictures. He did not reserve or control any storage space adequate for the storage of the pictures in New York from March, 1928, until the time of his death on January 18, 1931. He never made any definite plans for the return of the pictures to New York, or for their removal from the Pennsylvania Museum of Art in Philadelphia, except for the absence for less than one month of four pictures which were sent to Virginia and returned to Philadelphia (R. 35).

The Pennsylvania Museum of Art in Philadelphia paid all the expenses of transportation of the pictures from New York, including insurance on them while in transit.

SUMMARY OF ARGUMENT

The appellant has an adequate remedy at law in the nature of a statutory administrative procedure. Therefore, the court below properly dismissed the bill for lack of jurisdiction.

However, if this court holds that the court below had jurisdiction, we unite with appellant in hoping that the case will be disposed of finally at this time.

At the time of Mr. Clarke's death, his collection of paintings was in Pennsylvania. It had been here for almost three years. During that time it had been offered for sale to any buyer who would give it to the

Pennsylvania Museum, Philadelphia, for permanent exhibition. While the collection was returnable to Mr. Clarke on demand, he never, during the three-year period, made any definite arrangements to remove it from Philadelphia. He had given up the storage space in New York in which most of the paintings had been kept prior to their removal to Philadelphia.

Under these circumstances we contend that the paintings had an actual situs in Pennsylvania when Mr. Clarke died and were taxable by, and only by, this State.

There is no decision of this court to the contrary; and certain apparently adverse language in decisions which are not relevant on their facts, was uttered without reference to a situation such as this.

To say that a state can tax tangible personal property within its borders only if the property is located there permanently in the strict sense of that word, would exempt from taxation the great bulk of such property.

The rule is that tangible personal property is taxable where found, subject to certain well-recognized exceptions. This case does not fall within any such exception.

ARGUMENT

I.

THE DISTRICT COURT PROPERLY DISMISSED THE BILL FOR WANT OF JURISDICTION

In the court below we did not press the jurisdictional point. However, we realize that jurisdiction cannot be acquired by consent, and we conceive it to be our duty to present to this court our reasons for believing that the court below correctly refused jurisdiction.

The court below dismissed the bill for want of jurisdiction on the ground that appellant had an adequate remedy at law, referring particularly to MATTHEWS v. RODGERS, 284 U. S. 521 (1932), and KEOKUK & HAMILTON BRIDGE COMPANY v. SALM, 258 U. S. 122 (1922).

Appellant attacks the applicability of MATTHEWS v. RODGERS by saying that in that case the aggrieved taxpayer could have paid the tax under protest and then brought suit at law to recover it. But that case did not say that the absence of that specific form of remedy in itself gives jurisdiction to Federal courts of equity. And, as the court below in the present case pointed out (R. 44), although the Pennsylvania law does not provide for payments of tax and suits to recover the tax paid, neither does it "give to the State authorities the coercive measures of distraint and levy without a prior judicial determination of the legality and amount of the tax, if the taxpayer desires it and,

therefore, he has a completer remedy than by suit to recover a tax paid".

MATTHEWS v. ROGERS conceded the basis for Federal jurisdiction, but dismissed the bill for want of equity jurisdiction. Both elements must be present to sustain such a bill as this. Here there is diversity of citizenship, a ground for Federal jurisdiction, but, we submit, no ground of equitable jurisdiction.

Appellant seeks to discredit KEOKUK & HAMILTON BRIDGE CO. v. SALM, 258 U. S. 122 (1922), by saying that no diversity of citizenship was there involved. Appellant further insists that the court below in our case misapplied the KEOKUK BRIDGE CASE by failing to distinguish between the adequate remedy necessary to satisfy the requirements of the Due Process Clause and the adequate remedy necessary to defeat equity jurisdiction. But the report of the KEOKUK BRIDGE CASE shows that the district court had sustained a motion to dismiss on the ground that "the complainant has a plain, adequate, and complete remedy at law" (p. 123). And this court affirmed, not on the ground that the basis of the suit did not involve a valid constitutional question, but because plaintiff had ample opportunity to question its tax assessments through the statutory procedure provided by state law.

In BOHLER v. CALLAWAY, 267 U. S. 479 (1925), this court, in distinguishing the KEOKUK BRIDGE CASE from the case then before it, said (pp. 486-487):

> "* * * Appellants cite Keokuk & H. Bridge Co. *v.* Salm, 258 U. S. 122, 66 L. ed. 496, 42 Sup. Ct.

Rep. 207, as indicating the contrary. That was a bill in equity by a bridge company to enjoin a tax assessment by county assessors on a railroad bridge, because of discrimination. The assessment made by the county assessors was subject to revision by a board of review required to give a hearing and to correct the assessment as should appear just. The payment of taxes was not to be enforced by distraint or levy, but by legal proceedings in a civil suit for the collection of a debt in which the owner might appear and defend on any legal ground, including discrimination. The complainant there brought his bill without taking any of the steps offered by the statute as an administrative remedy and ignored the defense he might make in the suit to collect the tax. * * *"

Likewise in the present case, the tax is not to be enforced by levy or distraint. And likewise appellant has failed to pursue the administrative remedies afforded by the tax law itself.

But, a more recent decision of this court renders unnecessary reliance on either MATTHEWS v. RODGERS or KEOKUK & HAMILTON BRIDGE CO. v. SALM. PORTER v. INVESTORS SYNDICATE, 286 U. S. 461 (1932), affords ample justification for the action of the court below.

In the PORTER CASE a Minnesota corporation sought an injunction in a Federal district court, against an officer of the State of Montana, to prevent revocation of the plaintiff's license to sell securities in Montana. The defendant, who was State Investment Commissioner, had promulgated certain rules applicable to plaintiff, and had threatened to revoke plaintiff's license if it failed to comply with the rules. Plaintiff

alleged that such a revocation would deprive it of rights guaranteed to it by the Federal Constitution.

The defendant objected to the jurisdiction. But a three-judge court held that it had jurisdiction, and issued the injunction sought by the plaintiff. On appeal to this court, the decree was reversed after consideration of the jurisdictional question only. The ground of the reversal is stated in the following portion of the opinion of Mr. Justice Roberts (p. 468):

> "We are of opinion that the appellee failed to exhaust its administrative remedy before applying to the District Court for injunctive relief. The granting and revocation of permits is an exercise by the appellant of delegated legislative power. Section 4038 of the Code (supra) confers on any interested person dissatisfied with a finding or decision by the commissioner, the right within thirty days to bring an action against him in a state district court to vacate his order and set it aside as unjust or unreasonable, and directs that on the hearing the judge 'may set aside, modify or confirm said * * * decision as the evidence and the rules or (sic) equity may require.' The section confers the right to appeal to the State Supreme Court from the judgment of the trial court. Clearly the function of the state district court under the statutory mandate is not solely judicial, that is, to set aside a decision of the commissioner if arbitrary or unreasonable and hence violative of constitutional rights. The duty is laid on the court to examine the evidence presented and either to set aside or to modify or to affirm the commissioner's orders, as the proofs may require. The legislative process remains incomplete until the action of that court shall have become final. Prentis *v.* Atlantic Coast Line Co. 211 U. S. 210, 229, 230, 53 L. ed. 150, 160, 29 S. Ct.

> 67; Pacific Live Stock Co. v. Lewis, 241 U. S. 440, 444, 450, 451, 60 L. ed. 1084, 1095, 1097, 1098, 36 S. Ct. 637. And the capacity in which the court acts is none the less administrative because the proceeding is designated as a suit in equity instead of by appeal. Keller v. Potomac Electric Power Co. 261 U. S. 428, 438 442, 67 L. ed. 731, 734 736, 43 S. Ct. 445. When the appellee was notified on June 22, 1931, that the rule adopted by the appellant would become effective July 22nd of the same year, an action could have been filed in the state court and a hearing had upon all questions of fact and law touching the propriety and legality of the order."

The present case is parallel to the Pourten Case. The Pennsylvania statute (Bill of Complaint, paragraph 14; R. 6) provides for the fixing of the tax by an administrative officer in the first instance. From his action an appeal may be prosecuted to the Court of Common Pleas of Dauphin County. On such an appeal the court may "determine all questions of valuation, and the liability of the appraised estate for such tax subject to the right of appeal to the Supreme or Superior Court."

This statutory provision is an exact counterpart of the provision made by the Act of June 20, 1919, P. L. 521, Art. II, Sec. 13, (immaterially amended by the Act of June 22, 1931, P. L. 689), 72 PS Sec. 2327, for appeals to the several orphans' courts from appraisements of the estates of resident decedents for inheritance tax purposes. That the statutory language quoted authorizes the court to examine the question *de novo* and fix the tax and determine all questions of liability would seem to be obvious from the words

themselves; it is confirmed by the construction of the State Supreme Court: CONNELL'S ESTATE, 282 Pa. 555, 558 (1925).

Therefore, we have present every element mentioned by Mr. Justice Roberts in the PORTER CASE, an initial appraisement or assessment by an administrative officer, an appeal from his action, and an entirely new determination by the court on that appeal. Clearly the action of the court is a continuance of the "legislative process" just as fully as was the action of the state court in the PORTER CASE.

Certain of the cases cited by the court below in the present case are discounted by appellant because it is said that they did not involve diversity of citizenship. The PORTER CASE did involve it.

Therefore, we submit that on the authority of the PORTER CASE alone, the decree of the court below in this case should be sustained. Plaintiff has an adequate remedy at law, namely, an administrative review of the original assessment of the tax,— and that remedy has not been exhausted.

One other consideration may be mentioned. If the jurisdiction of a Federal court in equity in a case of this kind is to be sustained merely on the ground of diversity of citizenship, it would mean that non-residents have a remedy by injunction which residents of Pennsylvania aggrieved by assessment of the very same tax could not have.

And if the jurisdiction should be sustained on the ground that substantial constitutional questions are

involved, it would mean that even citizens of Pennsylvania who, on constitutional grounds, question an inheritance tax appraisement involving the necessary amount, need not follow the statutory procedure for appeal, but may take their grievances into the Federal courts by bill in equity for an injunction.

II.

IN GENERAL TANGIBLE PERSONAL PROPERTY IS TAXABLE WHERE IT IS FOUND

Generally speaking, tangible personal property is taxable where it is, regardless of the owner's domicile.

Of course, a state cannot impose a property tax on tangible property *in transitu* through the state or upon property which has come to rest within the state for a fleeting time, the owner having a present intention promptly to remove it. These propositions do not require the citation of authority.

Possibly, property necessary for the transaction of certain types of business is not subject to the general rule which we have stated. We have in mind vessels, rolling stock of railroads, dredging equipment, road-building machinery, and the like. See HAYS v. PACIFIC MAIL STEAMSHIP CO., 58 U. S. 596 (1855); PULLMAN'S PALACE CAR COMPANY v. PENNSYLVANIA, 141 U. S. 18 (1891); UNION TRANSIT CO. v. KENTUCKY, 199 U. S. 194 (1905); NEW YORK EX REL. NEW YORK CENTRAL & HUDSON RIVER RAILROAD v. MILLER, 202 U.

S. 584 (1906); the dissenting opinion in Thomson v. Standard Dredging Co., 224 U.S. 362 (1912); Commonwealth v. American Dredging Company, 122 Pa. 386 (1888); Capital Construction Co. v. Des Moines, 211 Iowa 1228, 235 N. W. 476 (1931). Such property must be moved from place to place to enable the owner's business to be carried on. It would be extremely inequitable, to say the least, to enable the property to be taxed wherever it had come to rest; in the course of a year the property might become subject to taxation in a number of jurisdictions.

But, where the property involved is not of such a nature that its very use necessitates its movement from place to place, we submit that it is taxable where it has come to rest for an indefinite time.

Also, it is axiomatic that tangible personal property cannot be taxed by a state if the property has been permanently removed from the state: Delaware, Lackawanna & Western Railroad Co. v. Pennsylvania, 198 U. S. 341 (1905); Union Transit Co. v. Kentucky, 199 U. S. 194 (1905).

Authorities for the General Rule

To establish the general rule which we have stated, we cite Frick v. Pennsylvania, 268 U. S. 473 (1925), and Blodgett v. Silberman, 277 U. S. 1 (1928).

In the Frick Case, Mr. Frick having been domiciled in Pennsylvania, that State attempted to levy an inheritance tax upon property of his estate, as follows (page 487): (1) Rare paintings, rugs, furniture, bronzes, porcelains, and other art treasures housed

in a building in New York City especially constructed for the purpose; (2) Furniture, household furnishings, automobiles, tools, etc., in Mr. Frick's New York house and garage; and (3) Paintings, household furnishings, farming implements, etc., on Mr. Frick's estate at Prides Crossing, Massachusetts.

This court held that the property was beyond Pennsylvania's taxing power.

There was no discussion, in the opinion, of the question whether the property was "permanently" in New York and Massachusetts. The essence of the court's decision was stated by Mr. Justice Van Devanter, at page 489:

> "* * * as respects tangible personal property having an actual situs in a particular state, the power to subject it to state taxation rests exclusively in that state, regardless of the domicil of the owner. * * *"

At page 491, after discussing and quoting from UNION TRANSIT CO. v. KENTUCKY, 199 U. S. 194 (1905), and UNITED STATES v. BENNETT, 232 U. S. 299 (1914), Mr. Justice Van Devanter said:

> "Other decisions show that the power to regulate the transmission, administration, and distribution of tangible personal property on the death of the owner rests with the state of its situs, and that the laws of other states have no bearing save as that state expressly or tacitly adopts them,—their bearing then being attributable to such adoption, and not to any force of their own. * * *"

And at page 492:

> "* * * Here the tax was imposed on the transfer of tangible personalty having an actual situs in other states, New York and Massachusetts. This property, by reason of its character and situs, was wholly under the jurisdiction of those states, and in no way under the jurisdiction of Pennsylvania. True, its owner was domiciled in Pennsylvania, but this neither brought it under the jurisdiction of that state nor subtracted anything from the jurisdiction of New York and Massachusetts. In these respects the situation was the same as if the property had been immovable realty. * * *"

In the Blodgett Case Connecticut attempted to impose an inheritance tax on bank notes and coin which belonged to a resident of Connecticut but at his death were in a safe deposit box in New York. This court held that Connecticut could not impose the tax.

At page 18, Chief Justice Taft said:

> "* * * But we think that money, so definitely fixed and separated in its **actual situs** from the person of the owner as this was, is tangible property and can not be distinguished from the paintings and furniture held in the Frick Case to be taxable only in the jurisdiction where they were."

In that case the decision was based upon the mere presence of the money in New York.

Under the principles enunciated in these decisions, New York could not tax the Clarke paintings; Pennsylvania could tax them.

Intangible Property Tax Cases

Repeatedly this court has said that the rules relating to the taxation of tangible property are different from those governing the taxation of intangible property: Fitch v. Pennsylvania, supra, at page 494; Union Transit Co. v. Kentucky, 199 U. S. 194, 206 (1905).

Therefore, the intangible property tax cases cited by the appellant as the basis for its argument have little, if any, importance here.

The cases are relied upon by the appellant because of certain expressions in the opinions, not necessary to the decisions.

In Safe Deposit & Trust Co. of Baltimore v. Virginia, 280 U. S. 83 (1929), this court did state that "tangible personal property permanently located beyond the owner's domicile may not be taxed at the latter place". We repeat, that proposition is axiomatic. However, it does not follow by any means that the converse is true and that a state may tax tangible personal property within its borders only if the property is permanently located there.

And, in any event, the facts of the case show that the word "permanently" was not used in its ordinarily strict sense. The court ruled that certain securities held in trust in Maryland by a Maryland corporation could not be made the subject of taxation by the State of Virginia, which was the domicile of the beneficiaries of the trust. At page 92, the court said that these securities had "a permanent situs for lawful taxation"

in Maryland. But, by the express terms of the trust, the trust res would become the property of the Virginia beneficiaries at a fixed time some years thereafter. Therefore, it is obvious that the term "permanent situs" was not used to mean location within the state in such a manner that the property could never be removed. On the contrary, there was a definite time fixed when it would become the property of residents of Virginia, and, as it was intangible property, it would then be taxable only at the domicile of the owners: First National Bank of Boston v. Maine, 284 U. S. 312 (1932).

Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204 (1930), is cited by the appellant for the proposition that a state cannot tax tangible property which has been permanently removed from its borders. This cannot be disputed.

First National Bank of Boston v. Maine, 284 U. S. 312 (1932), is cited for the proposition that personal property is immune from taxation by more than one state at the same time or for the same period. This also is conceded, but has no importance here.

It is our position that the Clarke collection is not subject to inheritance taxation by New York and Pennsylvania, but is subject to such taxation only by Pennsylvania. There is no question of double taxation here. We have no doubt that the presence here as *amici curiae* of the Tax Commission of New York indicates that New York has no intention of refusing to refund the tax already paid if this court determines that the paintings are taxable by Pennsylvania.

The appellant also emphasizes the quotation from the opinion in FIRST NATIONAL BANK OF BOSTON v. MAINE, that, as respects tangible personal property, "The rule [*mobilia sequuntur personam*] has gradually yielded to the law of the place where the property is kept and used."

Why this is important to the appellant we fail to see. The Clarke pictures were kept in Pennsylvania, and used in Pennsylvania. They certainly were not being kept or used in New York.

Cases Involving Vessels, Rolling Stock, etc.

We shall now briefly discuss the cases dealing with the taxability of vessels, railroad rolling stock and the like.

In HAYS v. PACIFIC MAIL STEAMSHIP CO., 58 U. S. 596 (1855), California sought to tax ocean-going vessels, plying between New York, San Francisco and other ports. New York was the registered home port of the vessels. The vessels merely touched the port of San Francisco to discharge and take on cargoes, and to receive such attention as was necessary to enable them to proceed. The duration of the stay was usually ten or twelve days.

This court held that "the State of California had no jurisdiction over these vessels for the purpose of taxation".

On the other hand, where ships have been used and kept only within the boundaries of a single state for a number of years, they do acquire a taxable situs there:

Old Dominion Steamship Co. v. Virginia, 198 U. S. 299 (1905).

In New York ex rel. New York Central & Hudson River Railroad v. Miller, 202 U. S. 584 (1906), the State of New York was permitted to impose a franchise tax on all the property of the railroad, including all of its cars. This court held it immaterial that some if not all of the cars, spent a part of the tax year in other states; but it did "not appear that any specific cars or any average of cars was so continuously in any other state as to be taxable there" (p. 597).

In Cromer v. Standard Dredging Co., 224 U. S. 362 (1912), Porto Rico was permitted to tax dredging equipment used in the harbor of San Juan for fulfilling a contract with the United States Government. At page 372, Mr. Justice McKenna said:

> "The fact is not alleged, and no other fact which removed the property from the application of the rule that tangible personal property is subject to taxation by the state in which it is, no matter where the domicil of the owner may be * * *."

In Union Transit Co. v. Kentucky, 199 U. S. 194 (1905), Kentucky sought to tax cars permanently located in other states, and employed in such states for the purposes of the owner's business. This court held that the tax could not be imposed.

In Pullman's Palace Car Company v. Pennsylvania, 141 U. S. 18 (1891), this court had before it the question of the taxability of cars operated by the Pullman Company on railroads extending in and through

Pennsylvania. Pennsylvania had levied a capital stock tax against the company, based on a calculation of the average number of cars employed in the State, the company being a foreign corporation.

Although the constitutional objection to the tax was that it constituted a burden on interstate commerce, the court was obliged to determine whether property of the company, namely cars, had a taxable situs in Pennsylvania, in spite of the fact that they ran on lines which extended beyond the borders of the State.

This court ruled that the company had and used property which was sufficiently within the jurisdiction of Pennsylvania to give it a taxable situs there. The following excerpts from the opinion are pertinent here (p. 22):

> "'* * * A nation within whose territory any personal property is **actually situate** has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there.'
>
> "For the purposes of taxation, as has been repeatedly affirmed by this court, personal property may be separated from its owner; and he may be taxed, on its account, at the **place where it is**, although not the place of his own domicil, and even if he is not a citizen or a resident of the State which imposes the tax. * * *"

In distinguishing the facts of the PULLMAN CASE from earlier cases concerning taxability of ships in foreign ports, (*e. g.* HAYES v. PACIFIC MAIL STEAMSHIP CO., 58 U. S. 596 [1855]), Mr. Justice Gray said (141 U. S. at p. 23) that the ships were not taxable because they

were not "in any proper sense, abiding within" the limits of the state in which the foreign port was located.

In COMMONWEALTH v. AMERICAN DREDGING CO., 122 Pa. 386 (1888), the Supreme Court of Pennsylvania held that tug boats, scows and dredging machinery are taxable at the domicile of the owner. The court rested its decision squarely on the ground that (p. 391):

> "* * * From the nature of the business, it [the equipment of the dredging company] is in one place to-day and in another to-morrow, and, hence, not taxable in the jurisdiction where temporarily employed. * * *"

CAPITAL CONSTRUCTION CO. v. DES MOINES, 211 Iowa 1228, 235 N. W. 476 (1931), involved two questions, first, the right of an Iowa city to tax road machinery which on the assessment date was not in the state, and, second, the right to tax the property as between different tax districts in Iowa.

On the first question, the court found that the removal of the machinery to Illinois was for a temporary period, for completion of a road contract, — and that when the job was done the machinery was brought back to Iowa. That was ample basis for a finding that the absence was purely temporary. The second point involved the construction of an Iowa statute and determination of the burden of proof. No constitutional question or determination of actual situs was involved.

Even these cases, dealing with tangible personal property which must be moved from place to place to

enable its owner's business to be carried on, adhere very closely to the general rule that actual situs, not domicile of the owner, is the test of the right to tax. In the cases in which the state of the domicile was permitted to tax the property, the property did not have an actual situs in any other state. This was clearly the situation in HAYS v. PACIFIC MAIL STEAMSHIP CO., NEW YORK EX REL. ETC. v. MILLER, COMMONWEALTH v. AMERICAN DREDGING CO., and CAPITAL CONSTRUCTION CO. v. DES MOINES.

What is Taxable Situs?

A true description of the requisites for the acquisition of a taxable situs is set forth in 2 COOLEY ON TAXATION (4th Ed.), Section 452, page 982, as follows:

> "In order to acquire a situs in a state or taxing district so as to be taxable in the state or district regardless of the domicile of the owner and not taxable in another state or district at the domicile of the owner, tangible personal property must be **more or less permanently** located in the state or district. * * *"

And again, after pointing out that property in transit does not acquire a situs within the state until the transit has ended, the author says (pages 987-988):

> "A more difficult question arises where the transit element is wanting or is subordinate, as where personal property comes into a state to be kept there or used there for a considerable period of time but with no intention perhaps of keeping it there permanently. The governing rule, as usually stated, is that the taxable situs depends on whether the property is 'permanently' within the

state. However, in this connection, the word 'permanently' is apt to be misleading unless read in connection with the facts of the particular case. **It means a more or less permanent location for the time being.** * * *"

On this point, BLACKSTONE v. MILLER, 188 U. S. 189 (1903), is important. We realize that is has been overruled insofar as it held that intangible property could be taxed elsewhere than at the owner's domicile. But it is still a precedent on the question of the acquisition of a taxable situs.

This court decided in that case that money collected by a New York agent of a resident of Illinois, and held by the agent in its bank in New York subject to order of the owner, was subject to an inheritance tax in New York upon the death of the owner while domiciled in Illinois.

Concerning the acquisition of a taxable situs in New York, Mr. Justice Holmes said (page 203):

"* * * It is probable, of course, that he [the nonresident owner] did not intend to leave the fund there forever, and that he was looking out for investments, but he had not found them when he died. * * *

"* * * We also must take it to have been found that the property was not *in transitu* in such a sense as to withdraw it from the power of the state, if otherwise the right to tax the transfer belonged to the state. **The property was delayed within the jurisdiction of New York an indefinite time, which had lasted for more than a year,** so that this finding at least was justified. * * *"

The foregoing language aptly applies to the present case. Here the indefinite time had lasted for almost three years.

When speaking of the taxability of tangible property, Mr. Justice Holmes said (page 204) that it may be taxed "wherever the property is found."

The BLACKSTONE CASE is authority for the proposition that property left in a state other than the state of the owner's domicile for an indefinite time, — in that case, only a year, — acquires a taxable situs, even though the owner did not intend to leave the property there forever, but only while he arranged for further disposition of it.

We earnestly submit that the FRICK CASE, BLODGETT V. SILBERMAN and other authorities cited make it clear that tangible personal property, other than that peculiarly useful for mobile pursuits, is taxable in the state in which it has come to rest for an indefinite time.

III.

THE CASES CITED AS APPLIED TO THIS CASE

We have discussed not only the cases upon which we rely, but also those cited in opposing briefs.

How do the cases cited apply to the facts involved in the present case?

We submit that HAYS V. PACIFIC MAIL STEAMSHIP CO., NEW YORK EX REL. NEW YORK CENTRAL ETC., RAIL-

ROAD v. MILLER, COMMONWEALTH v. AMERICAN DREDGING COMPANY, and CAPITAL CONSTRUCTION CO. v. DES MOINES are wholly inapplicable. Ocean vessels, railroad rolling stock, dredging equipment, and road-building machinery, going from state to state, must be treated as a special class of property for which special rules must be provided.

However, even though they involved these special classes of property PULLMAN'S PALACE CAR COMPANY v. PENNSYLVANIA and GROMER v. STANDARD DREDGING CO., are authorities sustaining Pennsylvania's right to tax the Clarke paintings.

As the Clarke paintings were not permanently outside of Pennsylvania on the date of Mr. Clarke's death, the decisions in DELAWARE, LACKAWANNA & WESTERN RAILROAD CO. v. PENNSYLVANIA and UNION TRANSIT CO. v. KENTUCKY are of little value in determining whether **Pennsylvania** could tax the paintings. But the former case is authority for the proposition that **New York** could **not** tax the collection.

In the D. L. & W. CASE the coal had been shipped out of Pennsylvania to be sold. It could be returned to that State, but the possibility was remote.

After the Clarke collection reached Pennsylvania it was offered for sale provided it should be left by the buyer at the Pennsylvania Museum for exhibition. If sold, it could not go back to New York.

The FRICK CASE and BLODGETT v. SILBERMAN deny New York's right to tax, and, therefore, sustain Pennsylvania's right.

In the FRICK CASE, the household furniture, automobiles, tools, etc., in the New York house and garage and at Prides Crossing, Massachusetts, could readily be interchanged with property of a similar nature in Mr. Frick's Pennsylvania home. They were movable property.

There is no distinguishing feature here. Mr. Clarke's pictures were in Pennsylvania. There was **presently** no other place for them. They might have been returned to New York if Mr. Clarke had seen fit to procure a place to put them, but he did not do so. Had the pictures been sold, under the option given by Mr. Clarke, they would have remained in Pennsylvania.

Pennsylvania was not permitted to tax the tangible personal property in the Frick houses in New York and Massachusetts. New York could not validly tax the Clarke collection.

In BLODGETT V. SILBERMAN the currency was in New York. Therefore Connecticut could not tax it.

In this case, the pictures were in Pennsylvania. Therefore, New York could not tax them.

In neither the FRICK CASE nor the BLODGETT CASE was there any discussion about the **permanency** of the presence of the property where it was found on the date of the owner's death. It was taxable where it was, and not taxable by the state of the owner's domicile.

SAFE DEPOSIT & TRUST COMPANY OF BALTIMORE V. VIRGINIA, FARMERS LOAN & TRUST CO. V. MINNESOTA

and First National Bank of Boston v. Maine do not apply to this case because they involved the taxability of intangible, not tangible, property.

IV.

DISCUSSION OF THE FACTS

We repeat that nowhere in the record is there any justification for the statement which occurs in opposing briefs that Mr. Clarke at any time intended that his paintings should be returned **to New York.** He had made a loan, not a gift. Therefore, the paintings were to be returned to him, but there is nothing to show that he had a definite intention that they should go back to New York.

Mr. Clarke, immediately upon making the loan, gave up the storage space where most of the paintings had been kept while in New York. This is eloquent evidence of his intention to keep the pictures in Pennsylvania for an indefinite time.

About a year after the loan was made (R. 35), Mr. Clarke gave to the Director of the Pennsylvania Museum in Philadelphia what amounted to an option to buy his entire collection. However, he made it a condition that the purchaser must present the collection to the Pennsylvania Museum at Philadelphia. Obviously, this option contemplated that the paintings would remain permanently in Philadelphia.

This option continued from about March, 1929, to July 17, 1930. Thereafter, until the time of his death

on January 18, 1931, Mr. Clarke was willing to dispose of his pictures to any purchaser who would buy the collection as a whole for presentation to the Pennsylvania Museum or to a substantially similar institution and who would pay the price set upon it by Mr. Clarke (R. 36).

Such a sale would certainly not involve the return of the paintings to New York unless the "substantially similar institution" might happen to be a New York institution.

In April, 1929, four portraits were sent from Philadelphia to Richmond for exhibition. In May of the same year they were returned, not to New York, but to Philadephia. That was their situs for the time being.

When Mr. Clarke died, the pictures were in Pennsylvania, where they had been for two years and ten months.

Under these facts there cannot be a doubt that for at least a year and ten months prior to Mr. Clarke's death, his paintings had been in Pennsylvania under conditions indicating that they might never be returned to New York.

We are not arguing that they were permanently in Pennsylvania, but we do say that they were here for an indefinite time. They had an actual situs here. They were commingled with other property of a like character in Pennsylvania. They were housed and exhibited in a great public museum with other valuable

works of art. They were being protected by Pennsylvania. As between New York and Pennsylvania, Pennsylvania is the state which had the power to tax them at the time of Mr. Clarke's death.

If it be argued that under the decisions it must be shown that the property was being "kept and used" in Pennsylvania, the facts meet that test. The paintings were kept in Pennsylvania, and they were used here for the only purpose for which paintings can ever be used.

It is interesting to reflect that before the paintings came to Pennsylvania, most of them were in storage. They had been kept in New York, but not used.

If there is any importance attached to the fact that on several occasions Mr. Clarke "suggested" that his collection be returned (R. 4), and, if these suggestions can be construed as declarations of intention to return the paintings to New York, they were, when not carried out, what are known in the law of domicile as mere floating intentions and, as such, were not sufficient to shift the situs for taxation from Pennsylvania back to New York. See GILBERT v. DAVID, 235 U. S. 561, 569 (1915); DORRANCE'S ESTATE, 309 Pa. 151, 172 (1932), certiorari denied, U. S. , 53 Sup. Ct. 507 (1933).

Suppose Mr. Clarke had leased a property in Philadelphia from month to month, and had moved his paintings into the leased property, and, under his own name had exhibited them, either free or for an admission fee. Suppose that the exhibition had lasted for almost three years, and that during the course of it, Mr.

Clarke had offered the collection for sale to anyone who would agree not to move the paintings out of Philadelphia.

Could anyone doubt that under these circumstances, the property would have been subject to the jurisdiction of Pennsylvania; that the property would have had an "actual situs" here?

The real facts are equally as strong.

There is no doubt that, in the language of COOLEY, the paintings were "more or less permanently" located in Philadelphia "for the time being."

The presence of the pictures in Pennsylvania was as permanent as any location of personal property is likely to be. It was of a decidedly more permanent character than the presence of the securities in Maryland in SAFE DEPOSIT & TRUST CO. OF BALTIMORE v. VIRGINIA, more permanent than the location of the funds in New York in BLACKSTONE v. MILLER, and more permanent than the Pullman cars in the PULLMAN CASE.

The pictures were "actually situate" in Pennsylvania; they were "abiding within" its limits; they constituted "property found within its jurisdiction."

V.

CONCLUSION

We believe that the court below correctly dismissed the bill of complaint for want of jurisdiction.

However, if the court had jurisdiction, we submit that the bill must nevertheless be dismissed because:

(a) The defendants have a right, as officers of Pennsylvania, to tax any tangible personal property which has an actual situs in that State; and

(b) The Clarke collection of paintings under the facts set forth in the pleadings and the stipulation of counsel, had an actual situs in Pennsylvania on the date of Mr. Clarke's death.

Respectfully,

WM. A. SCHNADER,
Attorney General.

HARRIS C. ARNOLD,
Deputy Attorney General.

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933. No. 84.

CITY BANK FARMERS TRUST COMPANY, Executor under the Will of THOMAS B. CLARKE, Deceased, Appellant,

v.

WILLIAM A. SCHNADER, Attorney General of the Commonwealth of Pennsylvania, and LEON D. METZGER, Secretary of Revenue of the Commonwealth of Pennsylvania.

SUPPLEMENTAL MEMORANDUM FOR APPELLEES IN ANSWER TO APPELLANT'S REPLY BRIEF

WM. A. SCHNADER,
Attorney General.

State Capitol,
Harrisburg, Pa.

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IS TRANSFER INHERITANCE A LIEN ON TANGIBLE PERSONAL PROPERTY UNDER THE LAW OF PENNSYLVANIA?

At the oral argument in this case on November 9, 1933, I stated that Section 1401 of The Fiscal Code (Act of April 9, 1929, P. L. 343) does not impose a lien for transfer inheritance tax upon tangible personal property.

At page 10 of their Reply Brief, counsel for the ap-

pellant have incorporated a footnote the obvious purpose of which is to contradict my statement.

Counsel italicize the following language:

> "* * * but the lien of transfer inheritance taxes shall be limited to the property chargeable therewith, and, unless such taxes shall be sued for within five years after they are due, they shall cease to be a lien as against any purchaser of real estate."

The primary purpose of this memorandum is to give to the court fully the law regarding liens for transfer inheritance tax as it exists in Pennsylvania.

Section 3 of the Act of June 20, 1919, P. L. 521, provides that, "The tax on real estate shall remain a lien on the real estate on which the same is chargeable until paid."

In SHUGARS ET AL. V. CHAMBERLAIN AMUSEMENTS ENTERPRISES, INC., 284 Pa. 200 (1925), the Supreme Court of Pennsylvania held (page 206) that "the tax springs into life on the death of property owners; eo instanti, it becomes seated on their estates."

And at page 207, the court said:

> "* * * the legislature ordered that the tax, **when on real estate,** should remain a lien until paid. * * *"

Section 35 of the Act of 1919 prohibited the transfer of the stock of any Pennsylvania corporation or of any national bank located in Pennsylvania standing in the name of the decedent until the transfer inheritance tax had been

paid unless the Auditor General consented to the transfer prior to the payment of the tax.

The Act of 1919 did not impose a lien upon tangible personal property, nor does Section 1401 of The Fiscal Code, to which we have referred.

That section provides that:

> "All State taxes imposed under the authority of any law of this Commonwealth, * * * and unpaid bonus, interest, penalties, and all public accounts settled against any corporation, association, or person, shall be a first lien upon the franchises and property, both real and personal, of such corporation, association, or person, from the date of settlement, and whenever the franchises or property of a corporation, association, or person, shall be sold at a judicial sale, all taxes, interest, bonus, penalties, and public accounts, due the Commonwealth, shall first be allowed and paid out of the proceeds of such sale, before any judgment, mortgage, or any other claim or lien against such corporation, association, or person, but the lien of transfer inheritance taxes shall be limited to the property chargeable therewith, and, unless such taxes shall be sued for within five years after they are due, they shall cease to be a lien as against any purchaser of real estate."

Transfer taxes are never "settled." That term is technical in the law of Pennsylvania and applies only to corporation and certain other taxes. All of the taxes "settled" by the Department of Revenue are catalogued in Section 202 of The Fiscal Code (Act of April 9, 1929, P. L. 343).

Section 203 of the same act is entitled, "Duties in Connection with the Collection of State Taxes Not Settled by the Department." And clause (h) of that section renders it the duty of the Department of Revenue "to collect the transfer inheritance tax payable on estates of nonresident decedents."

Section 1401 of The Fiscal Code **reduced the duration of liens on real estate** for transfer inheritance tax. Under the former law the lien continued until the tax was paid. Under Section 1401 the lien ceases to exist unless the tax is sued for within five years after it is due. This is the extent to which Section 1401 affects liens for transfer inheritance tax. It does not create liens on tangible personal property, taxes on which are not "settled," but, as we have shown, collected without "settlement."

There is no lien on tangible personal property under any act.

We also have the following comments to make on other statements made in the Reply Brief:

It is immaterial whether the Commonwealth can appeal to the Court of Common Pleas of Dauphin County.

Once an appeal has been taken, the entire matter is before the court *de novo*, except that the appellant cannot raise any objections not specified in his appeal.

COMMONWEALTH v. MANOR GAS COAL CO., 2 Dauphin Co. 121, cited to the contrary in the footnote on page 2 of the Reply Brief, was decided in 1899,—twenty years be-

fore the passage of the present Pennsylvania inheritance tax act. It did not involve inheritance tax at all.

And it is not a fact that in this case the Court of Common Pleas could not have been called upon to consider questions of valuation "since there is no dispute as to the valuation of the paintings here involved" (Reply Brief, p. 4).

When the bill of complaint was filed, appellant had no means of knowing what the State's position on valuation would be.

The fact that the defendants in their answer admitted the valuation stated in the bill of complaint has no bearing whatever on the situation existing before the bill was filed.

Respectfully submitted,

WM. A. SCHNADER,
Attorney General.

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

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Appellant,

vs.

WILLIAM A. SCHNADER, Attorney General of the Commonwealth of Pennsylvania, and LEON D. METZGER, Secretary of Revenue of the Commonwealth of Pennsylvania.

MOTION ON BEHALF OF THE TAX COMMISSION OF THE STATE OF NEW YORK FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF.

SETH T. COLE,
Counsel for Amici Curiae.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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MOTION ON BEHALF OF THE TAX COMMISSION OF THE STATE OF NEW YORK FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE.*

COME Now, Mark Graves, John J. Merrill and John P. Hennessey, constituting the Tax Commission of the State of New York, and move this Honorable Court for leave to file the annexed brief as *amici curiae.*

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Albany, N. Y.

IN THE

SUPREME COURT OF THE UNITED STATES

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BRIEF ON BEHALF OF THE TAX COMMISSION OF THE STATE OF NEW YORK AS *AMICI CURIAE.*

Statement.

This case is here on appeal from the United States District Court for the Eastern District of Pennsylvania, which dismissed the bill of complaint for want of equitable jurisdiction. The primary question at issue is whether the Courts of the United States have equitable jurisdiction. With this question the Tax Commission of the State of New York is not especially con-

cerned. However, counsel for the appellant, in their brief, request that this Court make final disposition of the case on the merits and, if it is found that there is jurisdiction, the Tax Commission of the State of New York will be interested on the merits. It is therefore requested that this brief be considered in the event this Court shall see fit to take jurisdiction and decide the issue without referring it back to the District Court.

The facts of the case are correctly and adequately summarized in the brief of appellant, and it is unnecessary to repeat them here.

The question at issue is whether the collection of portraits owned by Mr. Thomas B. Clarke during his lifetime, which, in 1928, were loaned by him to the Philadelphia Museum of Art for exhibition purposes and which remained on exhibition in said Museum up to the time of his death on January 18, 1931, are subject to the death tax of the Commonwealth of Pennsylvania by virtue of such portraits having acquired an actual situs in said Commonwealth with such a degree of permanency as to divorce them from the operation of the law of the State of New York, in which Mr. Clarke was domiciled, and subject them to Pennsylvania law; in other words, the question is whether the transfer of said portraits upon the death of the owner was effected by the law of New York, on the one hand, or by the law of Pennsylvania, on the other.

ARGUMENT.

POINT I.

The collection of portraits owned by Thomas B. Clarke at the time of his death had its situs at his domicile in New York and the transfer thereof was made effective by virtue of New York Laws. Pennsylvania is without jurisdiction to impose a death tax.

That the state whose laws effected the transfer is the only one which has jurisdiction to impose a tax upon the privilege of succession under Mr. Clarke's will is established by the decisions in *Frick v. Pennsylvania*, 268 U. S. 473, and *First National Bank of Boston, Executor of Haskell v. State of Maine*, 284 U. S. 312.

It is conceded that the portraits had their permanent situs in New York prior to the time they were shipped to Philadelphia. It also seems to be agreed by all parties that if they thereafter acquired a permanent situs in Pennsylvania the law of that state accomplished the transfer, either directly or by giving recognition to the law of New York *(Frick v. Pennsylvania, supra)*, but that if they had only a temporary location in Pennsylvania they retained their permanent situs at the testator's domicile in New York, passed under the laws of that state and are subject to death taxation there. Hence, it must be decided whether, upon the facts of the case, the paintings had lost their permanent situs in New York and acquired a new permanent situs in Pennsylvania.

It is now settled by the decisions of this Court that real property can be subjected to death taxation by the state of its situs and none other, and also that intangible personal property (with the possible exception of such as may have a business situs in a state other than that of the owner's domicile) has its situs at the domicile of the owner and may be taxed for death purposes by the state of such situs only. With respect to tangible personal property, the trail is not so clearly blazed. If tangible personal property has an actual or permanent situs away from the state of the owner's domicile, the toll of death duties with respect thereto must be paid to the state where it is so situated and, of course, if its actual or permanent situs be in the state of the owner's domicile, it may be there subjected to death taxation and not elsewhere. But, where tangible personal property at the time of the owner's death is physically in a state in which he was not domiciled, for a temporary period or purpose and without intent of permanency, it may still be taxed at his domicile and not where physically located, because its actual or permanent location at the domicile has not been lost.

As is pointed out in appellant's brief, from a legal standpoint the question is closely analogous to that of domicile. That is to say, the *domicile* of the property must be determined. A person's domicile of origin persists until it is shown to have been changed, and two things are necessary to establish a change, viz., actual residence elsewhere, plus an intention to make such residence the domicile. The rule with respect to the situs of tangible personal property should be and is believed to be similar. Not alone should there be

physical presence of the property away from the owner's domicile, but it should be coupled with an intent on the part of the owner that it should have an actual or permanent situs where so located, such intent to be established by reference to all the facts and circumstances of the case, as is done where the domicile of a person is at issue.

Mr. Clarke was a patron of the arts, and at considerable expense and effort, over a period of years, had assembled the finest collection of early American portraits in existence, a collection that was and is of world wide interest and of great value. He kept these paintings at his domicile in New York but was generous in making them available to public inspection by loaning them from time to time for exhibition on various occasions. Even while the collection was on exhibition at Philadelphia, he loaned part of it for exhibition in Virginia. His act in loaning the collection to the Philadelphia Museum of Art was not primarily one of his own volition. He did so at the solicitation of his old time friend, Dr. Kimball, and in connection with the opening of the Museum, of which his friend was the director. He made the loan without recompense, although without doubt he could have secured substantial sums for the use of the collection by other institutions. Very clearly, he had no intention whatsoever that during his ownership the paintings should remain in Philadelphia permanently, but always intended that they should be returned to their regular place of custody at his home and domicile in New York.

It has been properly suggested by the state officers of Pennsylvania that works of art are of no value if

locked up and concealed from public view, but rank with the proverbial light hidden under a bushel. The real value of art is in its display where people may see it. Fortunate is any community to be peopled by men and women having a knowledge and appreciation of the fine arts. When Mr. Clarke consented to the exhibition of his collection in Philadelphia, he conferred a great boon, not alone on that city but on the entire State of Pennsylvania, whose metropolis it is. His act materially added to the cultural development of the people of the city and state, but the taxing authorities of the state seem inclined to discourage like generosity on the part of others.

The policy of Pennsylvania with respect to public art exhibits is shown by its statute exempting bequests of art objects for such purposes from death taxation (Act of July 9, 1919, P. L. 794, as amd. by Act of June 12, 1931, P. L. 553—pp. 5-6 of Record). This statutory provision is persuasive evidence that the State Legislature never intended to tax such objects merely because they happened to be on exhibition in the state at the time of the owner's death.

The value of the paintings was $714,750, upon which the annual increment would be, say, $35,000. This sum Mr. Clarke gave freely and willingly for the benefit of Pennsylvania and Pennsylvanians. In reciprocation, the taxing authorities of that state seek to exact a ten per cent tax from the beneficiaries of his will. Public policy and the encouragement of others to emulate Mr. Clark's example should be strongly persuasive to a decision that will not impose a penalty for his bounty.

In passing, notice may be taken of one of the arguments made by the Pennsylvania authorities in the District Court, viz., that inasmuch as Mr. Clarke gave up the storage place in New York where he had kept the portraits and received free storage at the museum in Philadelphia, he benefited by the transaction. Was he supposed to continue to pay for storage in New York which he was not using, or should he have paid the museum for storage in addition to the gratuitous loan of the collection? Does not the fact that it has been found necessary to resort to such an argument as this indicate the essential weakness of defendants' cause?

The temporary character of the location of the portraits in Philadelphia is manifested when it is borne in mind that they were originally loaned for use only in connection with the formal opening of the museum. There can be no doubt that during the time of the opening exhibition the presence of the paintings in Pennsylvania was only temporary and of a transitory character. Thereafter, from time to time, Mr. Clarke requested their return, but on each occasion, at the earnest solicitation of Dr. Kimball and because of the great appreciation shown by the public, he consented to leave the paintings at the museum for a further temporary period. Altogether the paintings had been on exhibition in the museum for approximately two years and ten months prior to the decedent's death. The original loan was not for that period, nor for any definite period, and actually was intended to be for a much shorter time. The fact that several requests for the return of the paintings were made during the period of the loan establishes that the decedent did not

intend to leave them in Philadelphia for any extended time. Furthermore, since several such requests were made, it must have been that only a short time intervened between each request. If necessary to support a decision in favor of appellant, this Court might well find that each request for the return of the collection was sufficient to establish a new date from which to compute the time element to be taken into consideration in determining the question of the acquisition of a permanent situs.

It is well established that the character and use of tangible personal property has much to do with the determination of the question of whether or not it has acquired a permanent situs when separated from the domicile of its owner.

(See *Irvin v. N. O., St. L. & C. R. R. Co.*, 94 Ill. 105).

Reference is made to a Pennsylvania decision, which seems to have attained the status of a leading case, since it has frequently been referred to with tacit approval in opinions of this Court. This decision is *Commonwealth v. American Dredging Co.*, 122 Pa. St. 386, in which it appeared that a Pennsylvania corporation owned certain dredges and a tug boat and scows which were located outside the State of Pennsylvania. The corporation was assessed for taxation upon its capital stock, including the value of these vessels, although they had never been within the limits of the State during the entire tax year. It objected to the inclusion of the value of the vessels in its capital stock, upon the ground that since they were without the State and had never been within it, they were not

liable to taxation by it. It was held that the value of this tangible personal property was properly subject to tax, the Court saying (p. 391):

> "It must be conceded that the property in question must be liable to taxation in some jurisdiction. If it were permanently located in another state, it would be liable to taxation there. But the facts show that it is not permanently located out of the state. From the nature of the business, it is in one place today and in another tomorrow, and, hence, not taxable in the jurisdiction where temporarily employed. It follows that if not taxable here, it escapes altogether. The rule as to vessels engaged in foreign or inter-state commerce is that their situs for the purpose of taxation is their home port of registry or the residence of their owner, if unregistered; Pullman Palace Car Co., 29 Fed. Rep. 66; Hays v. Pacific Mail Steamship Co., 17 How. 596. These vessels, if they may be so called, were not registered. Hence, their situs for taxation is the domicile of the owners. This rule must prevail in the absence of anything to show that they are so permanently located in another state as to be liable to taxation under the laws of that state."

It is common knowledge that dredging operations, particularly at seaports, frequently extend over a long period of time. Sometimes dredges and the tug boats and scows operated in connection with them are engaged for several years on one operation. Therefore, it would seem that the case last cited is almost direct authority to substantiate the contention made by appellant.

In *Delaware, L. & W. R. R. Co. v. Pa.*, 198 U. S. 341, a case which denied the right of Pennsylvania to tax a corporation on coal mined in that State but which had

been taken out of the State never to be returned, the *American Dredging Co.* decision was discussed and distinguished by this Court at page 356, as follows:

> "The asserted transitory nature of this property" [the coal] "does not seem to us to be material. At the time of the appraisement it had been transported beyond the jurisdiction of the State, never to return in kind, but was intended to be sold in the foreign State. Such property is entirely unlike the property involved in *Commonwealth v. American Dredging Co.*, 122 Pa. St. 386. That property consisted of vessels, or scows, or tugs, only temporarily out of the State of Pennsylvania, for the purpose of engaging in business, and liable to return to the State at any time, and was without any actual situs beyond the jurisdiction of the State itself."

It may be remarked that although it appeared in the *American Dredging Co.* case that the vessels were outside the State of Pennsylvania for at least the period of the taxable year, it did not appear for how long a period in addition to that year they had been outside the jurisdiction. The Court apparently did not deem the length of time during which the property had been and would be out of the State important, but merely considered the temporary character of its absence from Pennsylvania. It is respectfully submitted that this is the correct rule, and that property may be temporarily without the borders of a state for an extended period without that state losing jurisdiction over it. The character of the property is an important evidentiary fact to be considered in determining whether the location without the state is permanent or temporary. Dredges, barges, etc., owned by a dredging company would have but a temporary location at the place of their employment in the business of the company, no

matter how long they might be engaged there. So, too, paintings loaned by an art collector to a museum for exhibition with the understanding that they should be returned to him when the exhibition had been accomplished, would have only a temporary situs at the place where the exhibition was held, especially if the collector loaned them in the course of a custom which he had pursued for many years of exhibiting them around and about.

In considering this case, it must be remembered that the works of art owned by Mr. Clarke should be treated not merely as paintings but as a collection of paintings, the only appropriate use of which was to exhibit them to the public. They could only have value to him by reason of their use in such manner, just as the vessels of the dredging company could only be of use to it in transitory operations. To illustrate, Mr. Clarke might have stored his paintings in Pennsylvania, and, if so, they might have acquired a permanent situs there because their use as exhibition pieces would have terminated. They could not, however, acquire a permanent situs in that State by reason of a temporary loan to the museum there, as their original situs was in New York, to which State they were to be returned in accordance with their owner's wishes and course of dealing with them.

In *Gromer v. Standard Dredging Co.*, 224 U. S. 362, Porto Rico attempted to tax certain machinery and boats which at the time the taxes were levied were in the harbor at San Juan engaged in dredging work in pursuance of a contract of the defendant with the United States Government. The defendant was a Dela-

ware corporation. It did not appear how long the dredging machinery had been located in the harbor. The property was held to be taxable, but the prevailing opinion commented upon the fact that the question of temporary situs in the waters of Porto Rico had not been raised and was not in the case. Mr. Justice Day wrote a dissenting opinion, which was concurred in by Mr. Justices Hughes and Lamar. These Justices thought that the question of jurisdiction was important, and said (pp. 376-7):

> "It requires a showing that the property sought to be taxed is incorporated in or commingled with the property of the taxing authority, before it can become liable to taxation in any other jurisdiction than that of the domicile of the owner. *Commonwealth v. American Dredging Co.*, 122 Pa. St. 386 (see *infra*).
>
> "The decisions in this court indicate that personal property of a tangible character, to become taxable, must have acquired a *situs* of a permanent nature within the jurisdiction of the authority seeking to levy the tax. The use of the term 'permanent' in this connection may not mean the continued and unchangeable location of the property at a given place, but certainly does intend to include the idea of location which is not of a temporary or fleeting character."

The opinion continues (p. 379):

> "Tangible personal property is taxable at the owner's domicile, except where it is shown to have an actual *situs* elsewhere, and, as we have seen, actual *situs* is not gained when the property comes only temporarily within the taxing jurisdiction. Applying this test, we are of the opinion that this dredging outfit had not become incorporated into the personal property of the Territory of Porto Rico, as manifestly it was there temporarily only. In our judgment this situation falls far short of

> a location in Porto Rico sufficient to subject it to the taxing power of that Territory."

The fact that the language above quoted is contained in a dissenting opinion is not an indication that the views expressed were contrary to those of the majority of the Court, for the question of temporary situs was not in the case, and therefore they refrained from reference to it.

The views of Justices Day, Hughes and Lamar were in accord with the decision of this Court in *Morgan v. Parham*, 16 Wall. 471, which involved an attempt by the State of Alabama to impose a tax upon a coasting vessel plying between Mobile and New Orleans. This Court said (p. 476):

> "It is the opinion of the court that the State of Alabama had no jurisdiction over this vessel for the purpose of taxation, for the reason that it had not become incorporated into the personal property of that State, but was there temporarily only"

The vessel in the *Morgan* case was in regular trade between Mobile and New Orleans, and undoubtedly was in Mobile for a substantial portion of the year. It is entirely possible that the aggregate period during which it was in Alabama was far in excess of the period during which the Clarke paintings were in Pennsylvania. The case turned upon the point that the vessel had not become incorporated into the personal property of Alabama. Likewise, it cannot be said that the paintings of Mr. Clarke had become incorporated into the personal property of Pennsylvania.

Another decision closely in point is that in *Joiner v. Pennington,* 143 Ga. 438. There the facts indicate that a portable saw mill had been taxed in a county other than that in which the owner had his domicile. It was alleged that the mill had been for a year in the county in which it was taxed. The Court said that even so its location in the taxing county might have been only temporary. It further said (p. 440):

> "'If the mill is actually a portable saw mill, remaining only temporarily in the place to which it may be carried for operation, and if as a matter of fact it is carried from county to county, then it is clearly taxable as personal property belonging to the owner in the county of Jefferson, that is, the county of petitioner's" [the owner's] "residence * * *."

It is obvious that it was the character of the saw mill and the nature of its use which governed the Court in its decision and not the element of time. If the location away from the owner was temporary, even though it had existed for a year, it could have been temporary had it lasted for three years if other conditions remained the same.

In *Capital Const. Co. v. City of Des Moines,* 211 Iowa 1228, it appeared that the plaintiff, a contracting firm, had machinery in Illinois, where it was used on a construction project for a whole year, after which it was returned to Iowa. The plaintiff objected to a tax upon the value of the machinery in the State of Iowa. The Court in its opinion said (p. 1230):

> "The absence of the machinery from the state of Iowa, therefore, was only temporary, and not of a permanent nature."

For this reason the machinery is held to be taxable in Iowa.

In *Semple v. Commonwealth*, 181 Ky. 675, a resident of Texas complained of a tax in the State of Kentucky upon his furniture, automobile and bank account, which apparently had been in Kentucky for a considerable period of time and probably for at least a year. He frequently visited in Kentucky where he maintained an apartment under a yearly lease. At page 682 of the Court's opinion it was said:

> "In order that personal property may have a situs for taxation in a locality different from the domicile of its owner, such personal property must be permanently located at the place where it is sought to be taxed. No temporary location will alter its situs for taxation at a place other than the residence of its owner."

The furniture and automobile were held nontaxable.

The facts in the case at bar make it apparent that the portraits owned by Mr. Clarke were loaned by him to the City of Philadelphia for a purpose which wholly excluded the idea of the acquisition by them of a permanent situs in Pennsylvania.

It is true that the maxim *mobilia sequuntur personam* has not at all times been applied in the same way. It had its birth at a time when the great mass of personal property was tangible, but its application to that class of property has been modified to the extent that it is held not to apply where tangible personal property has acquired an actual and permanent situs away from the domicile of the owner (see *Union Re-*

frigerator Transit Co. v. Kentucky, 199 U. S. 194). The maxim still applies with respect to tangible personal property which has not acquired a permanent situs away from the domicile of the owner, even though it may never actually be found at the domicile of the owner (see *Southern Pacific Company v. Kentucky*, 222 U. S. 63). With respect to intangible personal property, which was almost unknown when the maxim originated, it applies with full force and vigor, at least so far as death taxation is concerned (see *First National Bank of Boston, Executor of Haskell, v. State of Maine*, 284 U. S. 312, *supra*). The point is that the maxim is applied by the courts when convenience and justice require and when it is necessary to apply it in order to prevent injustice. The instant case would seem to be one in which it is necessary to apply it in order to prevent a gross injustice.

To illustrate how great an injustice might result if appellant is denied the relief it seeks, suppose that under the law of Pennsylvania bequests of personal property could be made only to direct heirs and that bequests to collaterals were invalid. Assume further that the testator, a resident of New York, bequeathed the paintings to collateral relatives. Would this Court say that the will was invalid and that the wishes of the testator must be frustrated merely because of the fact that during his lifetime, moved by a spirit of philanthropy, he had seen fit to loan the paintings for exhibition in Pennsylvania? Or would it, on the other hand, decide that such was a case where in order to prevent injustice the *mobilia sequuntur personam* maxim should be applied so as to permit the wishes of the testator to be carried into effect? If the be-

quest under such circumstances would be held valid, the same considerations dictate that Pennsylvania be denied the right to tax the paintings, because the basis of death taxation is the granting by a state of the right of succession.

This Court has never held that tangible personal property which is only temporarily away from the owner's domicile may not be taxed by application of the *mobilia sequuntur personam* rule, and it is respectfully urged that no such doctrine should be enunciated in this case.

The decision of this Court in *Frick v. Pennsylvania*, 268 U. S. 473, *supra*, upon which considerable stress is laid by the Pennsylvania authorities, may be distinguished in very few words. In that case, there was no question of the permanency of the location of the tangibles involved for they were situated in part in an art gallery built for their reception in the City of New York and in part at the summer home of the decedent. Of course, tangibles so situated, with no intention of moving them to the domicile of the owner, are taxable where located. The case is entirely different from the one at bar.

The position of *amici curiae* in this brief is in accord with the law as it has been interpreted in the State of New York. In the *Estate of Charles W. Hawthorne*, Surrogate Foley of New York County, on June 9, 1931, made an order exempting from taxation the transfer in the estate of a nonresident of New York of paintings loaned by him for exhibition to an art gallery in the City of New York. Mr. Hawthorne's dom-

icile was in the State of Massachusetts. He was the owner of a collection of paintings which he was accustomed to send to different art galleries throughout the country. His death occurred on November 29, 1930. At that time, and for several years prior thereto, certain of his paintings had been on exhibition at the Grand Central Art Galleries in New York City. This institution sometimes exhibited the paintings in their own galleries in New York and sometimes sent them to be exhibited at other art galleries. Mr. Hawthorne, himself, from time to time withdrew some of his paintings from the custody of the Galleries and exhibited them elsewhere. At the time of his death, forty-eight of his paintings were on exhibition in New York. Under the regulations of the Galleries, Mr. Hawthorne was privileged to exhibit there such pictures as he chose and could withdraw any or all of them at any time.

The Grand Central Art Galleries is a New York membership corporation, not conducted for profit, and its purpose is to promote interest in art and encourage and assist living American artists. Its galleries are open to the public. Pictures loaned to it are displayed therein, and frequently special exhibitions are held of the works of different individual American artists.

The Surrogate of New York County made the order of exemption above referred to, even though the facts did not present as strong a case for exemption from the New York tax as is presented by the facts before this Court for exemption from the Pennsylvania tax, inasmuch as it did not appear that the Hawthorne paintings had ever had a situs in Massachusetts before they were sent to New York.

Although the New York Tax Commission had the right of appeal from this order of the Surrogate, they acquiesced in the decision, believing that it was correct not only from the standpoint of law but also from that of public policy. Their action in filing this brief is consonant with and for the purpose of upholding the position so taken by them.

All of which is respectfully submitted.

SETH T. COLE,
Counsel for
Tax Commission of the
State of New York.

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SUPREME COURT OF THE UNITED STATES.

No. 84.—October Term, 1933.

City Bank Farmers Trust Company, Executor under the Will of Thomas B. Clarke, Deceased, Appellant,
vs.
William A. Schnader, Attorney General of the Commonwealth of Pennsylvania, and Leon D. Metzger, Secretary of Revenue of the Commonwealth of Pennsylvania.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

[January 8, 1934.]

Mr. Justice Roberts delivered the opinion of the Court.

The appellant, by a bill filed in the District Court for Eastern Pennsylvania, sought to enjoin the appellees, who are officials of the Commonwealth of Pennsylvania, from attempting to impose and collect an inheritance tax. Diversity of citizenship and an amount in controversy exceeding, exclusive of interest, $3,000, were averred. The bill sets forth that Thomas B. Clarke, a citizen and resident of the state of New York, died there in 1931 leaving a will under which appellant qualified as executor; that at and before the time of Clarke's death there was on exhibition in Pennsylvania a collection of paintings owned by him, of the estimated market value at the date of his death of $714,750; that these paintings had been loaned to the Pennsylvania Museum and School of Industrial Art, a non-profit corporation, so that they might be exhibited in the museum of that institution; that the loan was negotiated orally and was for an indeterminate period, but the pictures were to be returned to Clarke at any time upon his request. The bill then quotes the Act of Assembly of Pennsylvania[1] whereby a transfer inheritance tax of a specified percentage of

[1]Act of June 20, 1919, P. L. 521; 72 Purdon's Penna. Stats. § 2301, as amended by Act of June 22, 1931, P. L. 690.

value is laid upon transfers, by will or the intestate laws, of property located within the Commonwealth, from a decedent not a resident of the Commonwealth at the time of his death; describes the procedure for the collection of the tax, namely, that the Department of Revenue, whenever occasion may require, shall appoint an appraiser to appraise the value of the property, if subject to tax; appraisement shall be made after notice to the interested parties; the appraiser shall report his valuation in writing to the Department of Revenue; whereupon that Department is required to give notice to all interested parties, and any person not satisfied with the appraisement may appeal to the Court of Common Pleas of Dauphin County, which may determine all questions of valuation and the liability of the appraised estate for the tax. The bill recites the appointment of an appraiser who duly notified the appellant of the proposed date of his appraisement; the making of a return, under protest, pursuant to instructions of the appellee Schnader, enumerating as property within the Commonwealth at the decedent's death the seventy-nine portraits in question, and denying taxable situs or taxability of the property in Pennsylvania; a hearing by the appraiser, who referred the question of taxability to the Department of Justice, of which the appellee Schnader is the head, and pending a decision by him postponed the appraisement indefinitely; and repeated requests for an immediate determination of tax liability in response to which the appellee Schnader orally advised the appellant its claim of nontaxability in Pennsylvania would be denied. The bill charges that if the statute be construed to impose an inheritance tax upon the paintings merely because they were temporarily within the Commonwealth at the time of the decedent's death, it is unconstitutional as depriving the appellant of property without due process and denying equal protection of the laws, in contravention of the Fourteenth Amendment; and if the statute be construed as not applying to the property, the threatened appraisal, assessment and collection by the defendants will unconstitutionally deprive the appellant of property without due process and deny it equal protection. It further charges that the threat of appraisement, assessment and collection, and the unlawful failure and refusal of the appellee Metzger to issue a waiver of taxes on behalf of the Commonwealth, have caused and are causing irreparable injury by interfering with the administration of the estate in the Surrogate's

Court of New York, preventing distribution, compelling the executor to maintain large cash reserves at a low rate of interest to cover a possible Pennsylvania tax and costs of litigation, and also that the threatened tax constitutes a possible lien and a cloud upon the title of the plaintiff, interfering with the sale of the paintings as directed by the will. The bill avers the absence of any adequate remedy at law.

A temporary injunction was issued, an answer was filed admitting the facts stated, and a statutory court of three judges was convened and heard the case on the pleadings and an agreed statement which is immaterial to the questions presented.

The answer asserted, and the court found, that the appellant had an adequate remedy at law, as it could appeal from the appraisement, when made, to the Dauphin County court, which has jurisdiction to pass on both the amount of the tax and the legality of its imposition. The bill was therefore dismissed for want of equity.

1. It is conceded that neither the statutes of Pennsylvania nor the decisions of its courts permit an action at law for the recovery of a tax paid under protest. If that procedure were permissible in the state courts, the appellant could pursue the same remedy in a federal court, there being the requisite diversity of citizenship and amount in controversy. *Matthews* v. *Rodgers*, 284 U. S. 521. Under the state law the only remedy afforded one who has paid a tax is an application for refund to the Board of Finance and Revenue, an administrative body; but the action upon the claim is final and no court may review or set aside the Board's decision.[2] The District Court, however, was of opinion that the taxpayer's right of appeal from the appraisal to the Court of Common Pleas of Dauphin County, constituted such a remedy at law as ousted the jurisdiction of a federal court of equity. The Act of Assembly[3] requires the appointment of an appraiser whose duty is to report his appraisement in writing to the Department of Revenue, which must then give immediate notice to all parties interested, and continues: "Any person not satisfied with the appraisement . . . may appeal within thirty days to the court of common pleas of

[2]Act of April 9, 1929, P. L. 343, Art. V, § 503; 72 Purdon's Penna. Stats. § 503.

[3]Act of April 9, 1929, P. L. 343, § 1202; 72 Purdon's Penna. Stats. § 1202.

Dauphin County, on paying or giving security to pay all costs together with whatever tax shall be fixed by the court. Upon such appeal, the court may determine all questions of valuation, and the liability of the appraised estate for such tax, subject to the right of appeal to the Supreme or Superior Court."

The appeal must be entered in a state court specifically designated by the statute, and is thus not an ordinary action at law, but a statutory proceeding. The Commonwealth has conditioned the right to implead it, upon resort to a forum of its choice. The taxpayer cannot, therefore, though a non-resident, appeal from the appraisement to a federal court. Moreover, in such cases, upon the perfecting of an appeal, the Commonwealth becomes the adverse party to the litigation in the common pleas court (*Comm.* v. *Taylor*, 29A Dauph. Co. Rep'r (Pa.) 102; *Comm.* v. *Taylor*, 32 Dauph. Co. Rep'r (Pa.) 207); and this fact would prevent removal of the case from the Dauphin County court to a federal court (Judicial Code, § 24, as amended; 28 U. S. C. § 41 (1); Judicial Code, § 28, as amended; 28 U. S. C. § 71) for the State is not a citizen within the purview of these statutes which define the jurisdiction of the federal courts and permit a removal to them (*Stone* v. *South Carolina*, 117 U. S. 430; *Postal Telegraph Cable Co.* v. *Alabama*, 155 U. S. 482; *Arkansas* v. *Kansas & Texas Coal Co.*, 183 U. S. 185), nor is the controversy one arising under the laws of the United States. *Tennessee* v. *Union and Planters' Bank*, 152 U. S. 454; *Chicago, R. I. & P. Ry. Co.* v. *Nebraska*, 251 Fed. 279. As the statutory remedy, if it be treated as an action at law, would lie only in the state court and is not cognizable by the federal courts, either as an original action or by removal, its existence cannot oust federal equity jurisdiction. *Smyth* v. *Ames*, 169 U. S. 466, 516; *Chicago B. & Q. R. R. Co.* v. *Osborne*, 265 U. S. 14, 16; *Risty* v. *Chicago, R. I. & Pac. Ry. Co.*, 270 U. S. 378, 388; *Matthews* v. *Rodgers, supra*, p. 526.

2. Since the Dauphin County court is empowered, upon appeal from the action of the appraiser, to determine all questions, including both valuation and liability for the tax, the contention is made that its function is at least in part administrative, and a suit for injunction may not be entertained by a federal court prior to the decision of the state court. *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210; *Porter* v. *Investors Syndicate*, 286 U. S. 461. The statutes under consideration in those cases delegated legislative

power of regulation to an administrative body and vested a revisory power in a court. As has repeatedly been held, the action of the court in such a matter is legislative rather than judicial so that one who has not pursued the legislative process to a conclusion cannot turn to a court of equity for relief from a regulatory order which is not the final word of the constituted state authority. But other decisions make it clear that while the action of the appraiser in a case like the present is purely administrative, the function of the court upon appeal is judicial in character, if, when the case is brought into the court, the Commonwealth becomes plaintiff and the taxpayer defendant, and the action is tried as an ordinary action, resulting in a judgment, which is final and binding on the parties, subject only to appeal to a higher State court, as permitted by the Act. This renders the proceeding judicial, and gives it the character of a suit or action at law.

In *Boom Company* v. *Patterson*, 98 U. S. 403, it appeared that the state law authorized the Boom Company to exercise the right of eminent domain. The statutes required an application to a court for the appointment of commissioners to appraise the value of the land to be taken. Should the award of the commissioners prove unsatisfactory to the company or to the land owner, an appeal lay to the district court, where the cause was to be entered by the clerk as a case upon the docket, the owner of the land being designated plaintiff and the corporation seeking condemnation defendant. The act required the court to proceed to "hear and determine said case in the same manner as other cases are heard and determined in said court". Of this procedure it was said, p. 406:

"The proceeding in the present case before the commissioners appointed to appraise the land was in the nature of an inquest to ascertain its value, and not a suit at law in the ordinary sense of those terms. But when it was transferred to the District Court by appeal from the award of the commissioners, it took, under the statute of the State, the form of a suit at law, and was thenceforth subject to its ordinary rules and incidents. The point in issue was the compensation to be made to the owner of the land; in other words, the value of the property taken. No other question was open to contestation in the District Court."

To the same effect see *Searl* v. *School District No. 2*, 124 U. S. 197; *Mason City R. R. Co.* v. *Boynton*, 204 U. S. 570.

In *Delaware County* v. *Diebold Safe Co.*, 133 U. S. 473, the question was as to a proceeding for the collection of a claim against the county. The statute directed that any person having a claim against a county should file it with the county auditor, who should present it to the board of commissioners, and they were required to examine the claim and allow it in whole or in part. No court was to have original jurisdiction of any claim against a county, but if the claimant felt aggrieved by the decision of the commissioners he might appeal to the circuit court of the county. Thereupon the auditor was to make a transcript of the proceedings before the board and deliver it to the clerk of the court. The appeal was to be docketed like other cases pending in the court, heard, and tried as an original cause. This court said, p. 486, that although the proceedings of the county commissioners are in some respects assimilated to proceedings before a court, and the commissioners' decision, if not appealed from, is not subject to collateral attack, yet the proceedings are in the nature not of a trial *inter partes*, but of an allowance or disallowance, by officers of the county, of a claim against it. The court added that "the trial in the Circuit Court of the county was 'the trial' of the case, at any time before which it might be removed into the Circuit Court of the United States, . . . ".

Chicot County v. *Sherwood*, 148 U. S. 529, involved procedure for the collection of county bonds. State legislation declared that a county could not be sued or proceeded against in any court except as in the act provided. Demands against the county were to be presented to the county court for allowance or rejection. From the order of that court appeals were allowed as provided by law. If in any such appeal the judgment of the county court was reversed, the reversal was to be certified by the superior court to the county court which was required to enter it as its own judgment. This court said, p. 532:

"If, however, the presentation of a demand against the county, duly verified, according to law, to the county court thereof, '*for allowance* or *rejection*' is not the beginning of a suit or does not involve a trial *inter partes*, it is *then* only a preliminary proceeding to a suit or controversy which, by the appeal of either side, is or may be carried to an appellate court, before which there is an actual trial between the parties interested. The right to maintain this revisory trial in the state court . . . will be sufficient

to maintain a like suit by original process in a federal court where the requisite diverse citizenship exists."

In *Smith* v. *Douglas County*, 254 Fed. 244, it appeared that a Nebraska statute imposed a tax on inheritances for the benefit of the county of the decedent's residence, at a stipulated rate upon the appraised value of the property. The method of levying the tax was that the county judge appointed an appraiser to report the valuation to the judge, who then fixed the value and the amount of tax and gave notice to all interested parties. Anyone dissatisfied with the judge's finding might appeal within sixty days to the county court upon filing bond to cover costs and the tax which might be fixed by the court. The statute provided that county courts should have jurisdiction "to hear and determine all questions in relation to all taxes arising under this article". It will be noted how closely the procedure resembles that prescribed with respect to the tax in controversy. It was held that the proceeding was *ex parte* until it reached the county court; but thereafter became a controversy *inter partes*, and the court's action in determining all questions in relation to the tax was not merely administrative, but judicial.

If the Dauphin County court were by the act of Assembly granted only the right to revise the valuation of the appraiser and precluded from considering any other question, its proceedings would be purely administrative, and the contention that the appellant had failed to pursue to the end its administrative remedy would be sound (*Upshur County* v. *Rich*, 135 U. S. 467) at all events where the valuation is a subject of controversy.

The court below relied upon *Keokuk & Hamilton Bridge Co.* v. *Salm*, 258 U. S. 122, where a bill to enjoin collection of a state tax was held to lack equity. That case is, however, distinguished by the fact that before resorting to any court the taxpayer could have appealed to the board of review to correct the assessment of which he complained, and the record failed to show that he had pursued the administrative remedy so afforded him (p. 125).

The Acts of Assembly of Pennsylvania direct the Department of Revenue to collect and the Attorney General to bring suit for the amount of the tax if it is not paid within one year of assessment. If, therefore, the appellant should omit to take an appeal to the Dauphin County common pleas court the assessment would become final and the appellant liable to suit for the amount of

the tax.[4] As the Commonwealth is the plaintiff in the action the cause could not be removed for reasons already stated.

We are of opinion that upon the making of the appraisement the administrative procedure is at an end and the appellant can thereafter resort to a federal court of equity to restrain further action by the state officers if in violation of constitutional rights.

3. The question then is whether the bill was prematurely filed. In view of what has been said the appellant's cause of action in equity will not, strictly speaking, arise until an appraisement is made and certified to the Department of Revenue and notice of the fact is given appellant. However, in view of the allegations of the bill, we are not inclined to hold the suit premature. The bill charges that the Secretary of Revenue has refused to issue a waiver of tax, and that the Attorney General has notified the appellant and the State's appraiser the property is subject to the tax, and the appellant's claim for exemption will be denied. The Commonwealth's law officers plainly intend to perform what they consider their duty, and will, unless restrained, cause the assessment and imposition of the tax. The action the legality of which is challenged thus appears sufficiently imminent and certain to justify the intervention of a court of equity. Compare *Pennsylvania* v. *West Virginia,* 262 U. S. 553, 592. Moreover, no purpose would be served by dismissing the bill, if, as we hold, the moment the proposed assessment is made another suit may be instituted in the federal court.

The decree of the District Court is reversed and the cause remanded with instructions to reinstate the bill and proceed to a hearing upon the merits.

So ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[4]Act of April 9, 1929, P. L. 343, § 203 (h), § 1406; 72 Purdon's Pa. Stats. § 203 (h), § 1406.